

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

In the Matter of )  
 )  
E J ) OAH No. 19-0086-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

E J is an adult male who receives services under the Intellectual and Developmental Disabilities (“IDD”) Medicaid Home and Community-Based Waiver (Waiver) program. Under his 2017-2018 Plan of Care (POC), E was authorized to receive 70 hours per week in supported living services and 15 hours per week in day habilitation services.

E applied to renew his POC for 2018-2019 and requested that he continue to receive 15 hours per week of day habilitation services. He also requested 84 hours of supported living services per week.<sup>1</sup> The Division of Senior and Disabilities Services (Division) approved the 2018-2019 POC overall but reduced his day habilitation hours to 12 hours per week. In addition, the Division denied E’s request for 14 additional hours per week of supported living services as it did under the prior POC. E’s guardian appealed the Division’s determination.

The Alaska Medicaid regulations limit day habilitation services to 624 hours per year, or an average of 12 hours per week for 52 weeks, unless a Waiver recipient faces institutionalization or a risk to his health and safety without additional day habilitation hours. The evidence shows that E’s mental health, his communication and coping skills, and his safety would decline if his day habilitation hours are reduced to 12 hours per week. Accordingly, the Division’s decision to reduce E’s day habilitation hours to 12 hours a week is **REVERSED**. The Division is directed to continue to provide E with 15 hours of day habilitation services per week.

In addition, the evidence established that E needs 72 hours per week of supported living services to work on his goals and objectives, for personal care, and for protective oversight and supervision. Accordingly, the Division’s decision to only authorize 70 hours of supported living services per week is **REVERSED**. The Division is directed to provide E with 2 additional hours per week of supported living services for a total of 72 hours of supported living services per week.

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<sup>1</sup> E, under the 2017-2018 POC, had also requested 84 hours of supported living services each week but only 70 hours of such service were approved. See J Exh. 000061.

## II. Facts

### A. Background

E is a 38-year old male who resides with his court-appointed guardians, S and D C.<sup>2</sup> He has an intellectual disability, as well as cerebral palsy, osteopenia, a detached retina, glaucoma, and quadriplegia.<sup>3</sup> E is non-ambulatory, incontinent, and is completely dependent upon staff for all of his personal and physical needs.<sup>4</sup> He functions at approximately four to five year old level.<sup>5</sup> E likes to smile and is happy living with his mother and step-father.<sup>6</sup> He enjoys going out into the community and is an ardent baseball fan.<sup>7</sup>

Prior to moving to Alaska, E lived with his father and step-mother in Georgia and suffered neglect, as well as verbal and financial abuse.<sup>8</sup> At times he was left isolated in a room, lying in feces and urine.<sup>9</sup> After E's father was removed as his guardian, E spent some time in a nursing facility out-of-state before moving to Alaska.<sup>10</sup> After he moved to Alaska, E initially lived with his mother, S C, and her husband, D C.<sup>11</sup>

When E moved to Alaska, he had a variety of behavioral issues: he expressed himself with verbal outbursts when frustrated, would swear and bring up inappropriate topics such as sex, and would incite others with racial slurs.<sup>12</sup> His care was exhausting and his mother was unable to work while caring for him, which was a financial hardship for the family.<sup>13</sup> E then moved to a group home setting in Alaska.<sup>14</sup> Unfortunately, he suffered three concussions while there and was psychiatrically unstable, despite a high level of psychiatric care.<sup>15</sup>

E was very excited to move from the group home into the handicap-accessible home in City A, which the Cs purchased in 2017.<sup>16</sup> In order to accomplish this transition, S C made significant changes

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<sup>2</sup> Exh. E, p. 8.

<sup>3</sup> J Exh. 000013; Exh. E, p. 8.

<sup>4</sup> Exh. E, pp. 8 & 11.

<sup>5</sup> J Exh. 000005.

<sup>6</sup> Exh. E, pp. 8 & 12.

<sup>7</sup> Exh. E, pp. 8 & 11.

<sup>8</sup> J Exhs. 000005-000006.

<sup>9</sup> J Exh. 000006.

<sup>10</sup> J Exh. 000007.

<sup>11</sup> J Exh. 000007.

<sup>12</sup> J Exh. 000005.

<sup>13</sup> J Exhs. 000007-000008.

<sup>14</sup> See J Exhs. 000043, 000047, 000068.

<sup>15</sup> J Exhs. 000067, 000188, 000190, 000192-000193. E sustained some brain damage as a result of these concussions. See Testimony of D T.

<sup>16</sup> J Exhs. 000047, 000071, 000117, 000128. The Cs made this move to provide a safer environment for E. See J Exh. 000117.

to her personal and professional life.<sup>17</sup> Since moving to the Cs' home, E's quality of life has greatly improved, and he has not needed the same level of psychiatric care.<sup>18</sup> He enjoys a great relationship with his mother and step-father.<sup>19</sup>

### ***B. E's IDD Plans of Care***

E receives waiver services through the IDD program. His services include supported living, individual day habilitation, agency-based respite, agency-based daily respite, nursing oversight, and care management.<sup>20</sup> E's supported living and day habilitation services are the subject of the current dispute.<sup>21</sup>

#### *1. E's 2017-2018 Plan of Care (POC)*

In his 2017-2018 POC, E requested 84 hours per week of supported living services and 15 hours per week of day habilitation services.<sup>22</sup> The POC stated that E "would like to have Supported Living Services to provide the needed assistance to reside in his own home," rather than a nursing facility, and "to provide for all of his activities in his home."<sup>23</sup>

The requested hours of supported living services were designed to further six goals: (1) developing and building skills to enable E to learn and be involved in his self-care and well-being in the home; (2) having E help with chores around the house to the best of his ability; (3) providing E with opportunities for socialization; (4) having E use positive communication to let E's thoughts or frustrations be known each day; (5) increase his drumming skills; and (6) having E learn to use modern technology to increase his independent living skills.<sup>24</sup>

These goals, and their objectives, emphasized encouraging and assisting E in maintaining and increasing his "skills of independent living" and increasing E's participation in social activities.<sup>25</sup> At the same time, the POC recognized that E needed staff assistance with every task he undertakes given his physical challenges.<sup>26</sup>

E's day habilitation goals under the 2017-2018 POC were to: (1) engage in community activities that interest him; (2) maintain his maximum level of independence while participating

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<sup>17</sup> J Exh. 000071. At this time, S became E's primary caregiver. See Testimony of Ms. T.

<sup>18</sup> J Exh. 000188.

<sup>19</sup> J Exh. 000071.

<sup>20</sup> J Exh. 000061; Exh. D, pp. 1-2.

<sup>21</sup> Exh. D, p. 2; Exh. C, p. 1.

<sup>22</sup> J Exhs. 000062-000062, 000065.

<sup>23</sup> J Exh. 000078.

<sup>24</sup> J Exhs. 000079-000081 & 000083-000085.

<sup>25</sup> J Exhs. 000079-000085.

<sup>26</sup> J Exh. 000078.

in community activities; (3) develop coping skills; and (4) develop and build skills to enable him to learn and be involved in his self-care and well-being in the community. E requested 15 weekly hours of day habilitation services, the same amount of day habilitation services that he had been receiving under his 2013-2014 POC, 2014-2015 POC, 2015-2016 POC, and 2016-2017 POC.<sup>27</sup>

The Division approved the requested 15 hours of day habilitation services. However, the Division only approved 70 hours per week of supported living services.<sup>28</sup> E did not appeal that determination.<sup>29</sup>

## 2. *Changes to the day habilitation regulation*

Before October 2017, there was no cap for day habilitation services. In 2017, the Department of Health and Social Services (DHSS) amended certain Medicaid regulations, including the regulation governing day habilitation hours. That amended regulation, which went into effect on October 1, 2017 states:

(c) The department will not pay for more than 624 hours per year of any type of day habilitation services from all providers combined, unless the department approves a limited number of additional day habilitation hours that were

(1) requested in a recipient's plan of care; and

(2) justified as necessary to

(A) protect the recipient's health and safety; and

(B) prevent institutionalization.<sup>30</sup>

After litigation over procedural errors in how the new regulation was implemented, DHSS entered into a settlement, agreeing to temporarily change how the Division would apply the new regulatory cap to requests for day habilitation services:

Until SDS can issue a regulatory amendment for public comment that offers more definition on what SDS will consider when approving day habilitation services, SDS will review requests for day habilitation that exceed an average of 12 hours per week to consider whether the additional hours are needed to protect the recipient's health and safety *or* to prevent institutionalization.<sup>31</sup>

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<sup>27</sup> See Claimant's Supplemental Brief on Why Department Bears the Burden of Proof When Reducing Day Habilitation, p. 3.

<sup>28</sup> J Exh. 000061-000062.

<sup>29</sup> According to E's care coordinator, the determination was not appealed because she and the Cs were primarily focused on moving E out of the group home because of the injuries he had incurred there. See Testimony of D T.

<sup>30</sup> Exh. B, p. 17.

<sup>31</sup> See OAH, Case No. 19-00140-MDS, at n. 13; see also SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2018, available at <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>.

The Division has been using this revised standard to review the day habilitation services outlined in Plans of Care that have subsequently been submitted to the Division.<sup>32</sup>

### 3. E's 2018-2019 Plan of Care

E submitted his POC for November 12, 2018 through November 11, 2019 to the Division. As in the 2017-2018 POC, E again requested 84 hours per week of supported living services.<sup>33</sup> The requested hours of supported living services were designed to further six goals: (1) developing and building skills to enable E to learn and be involved in his self-care and well-being in the home; (2) having E help with the chores around the house to the best of his ability; (3) providing E with opportunities for socialization; (4) having E use positive communication to let his thoughts or frustrations be known each day; (5) increase his drumming skills; and (6) having E learn to use modern technology to increase independence.<sup>34</sup> These goals and their objectives were identical to the goals and objectives for the supported living services listed in the prior POC.<sup>35</sup> The 2018-2019 POC, under the supported living section, notes that E becomes frustrated if he feels staff is ignoring him or not willing to work with him.<sup>36</sup>

In the 2018-2019 POC, E also requested that he continue to receive an average of 15 hours of day habilitation services per week -- *i.e.*, 3,120 fifteen-minute units for the year.<sup>37</sup> E's day habilitation goals under the 2018-2019 POC were to: (1) engage in community activities that interest him; (2) maintain his maximum level of independence while participating in community activities; (3) develop coping skills; and (4) develop and build skills to enable him to learn and be involved in his self-care and well-being in the community.<sup>38</sup> These goals, and the objectives listed under them, were identical to those in his prior POC.<sup>39</sup>

In connection with his day habilitation services, the 2018-2019 POC states that E "greatly enjoys getting out into the community and interacting with others."<sup>40</sup> It further describes E as

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<sup>32</sup> See Exh. D, p. 2.

<sup>33</sup> Exh. E, p. 2; *see also* Exh. D, pp. 1-2.

<sup>34</sup> Exh. E, pp. 16 & 18-20.

<sup>35</sup> *Cf.* Exh. E, pp. 16 & 18-20 *with* J Exh. 000140-000146.

<sup>36</sup> Exh. E, pp. 11-12 (noting that with "two or fewer prompts and redirection, E will refrain from outbursts when frustrated and verbal outbursts about staff and peers"). *Cf.* J Exh. 000005 (indicating that when E is frustrated, he expresses himself with verbal outbursts and swears, brings up inappropriate topics like sex, and tries to incite others with racial slurs).

<sup>37</sup> See Exh. E, p. 2; *see also* Exh. D, pp. 1-2.

<sup>38</sup> Exh. E, pp. 24-27.

<sup>39</sup> *Cf.* Exh. E, pp. 24-27 (2018-2019 POC) *with* J Exhs. 000148-000151 (2017-2018 POC).

<sup>40</sup> Exh. E, p. 24.

sometimes “lacking in social graces.”<sup>41</sup> The POC also notes that staff is needed while E is in the community, “not only to maintain his safety but to give him appropriate prompts and cues about how to interact socially in a non-offensive fashion.”<sup>42</sup>

### ***C. The Division’s Review and Partial Denial***

On January 8, 2019, the Division notified E’s guardians that his day habilitation hours would be reduced to 12 hours per week, and denied his request for 15 hours per week of day habilitation services.<sup>43</sup> The Division also notified E’s guardians that 70 hours of supported living services had been approved; however, E’s request for 14 additional weekly hours of supported living services had been denied.<sup>44</sup> In its denial letter, the Division provided a link to all the Medicaid waiver regulations.<sup>45</sup>

#### ***1. E’s Day Habilitation Hours***

With regard to E’s request for 15 hours of day habilitation, the denial letter cited to the changed regulation for day habilitation services.<sup>46</sup> While the letter acknowledged the benefits of day habilitation services for E, the Division concluded that the approved level of services – *i.e.*, 12 weekly hours -- met E’s needs:

While the division acknowledges that E benefits from engaging in day habilitation activities, the POC does not demonstrate why the additional hours of Day Habilitation are necessary to protect his health and safety or to prevent institutionalization or what other waiver or non-waiver resources E’s team explored to meet his needs. E’s overall approved level of service is . . . of sufficient amount, scope, and duration to meet his needs and achieve the intent of the POC.<sup>47</sup>

The denial letter also stated that E’s 2017-2018 POC only emphasized the importance of day habilitation services to facilitate activities E chooses to participate in, to establish new friendships, and to provide *safety* and appropriate prompts and cues about how to interact socially in a non-offensive fashion.<sup>48</sup> The Division further noted that E’s care coordinator had

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<sup>41</sup> Exh. E, p. 24.

<sup>42</sup> Exh. E, p. 24.

<sup>43</sup> Exh. D, pp. 1-2.

<sup>44</sup> Exh. D, pp. 1-2.

<sup>45</sup> Exh. D, p. 2.

<sup>46</sup> Exh. D, p. 2.

<sup>47</sup> Exh. D, p. 2.

<sup>48</sup> Exh. D, p. 2 (emphasis added).

been given the opportunity to provide additional information to support his request for additional day habilitation hours but had not provided any further information.<sup>49</sup>

## 2. *E's Supported Living Hours*

In denying E's renewed request for 2 additional hours per day (or 14 additional hours per week) of supported living services, the Division noted that it had denied this request previously "due to lack of justification and supporting documentation."<sup>50</sup> The Division concluded that the "skill building activities presented do not fulfill the daily time requested," but didn't elaborate on how it reached that conclusion.<sup>51</sup> Finding that E's team had "not demonstrated that the approved level of service is insufficient to meet E's needs," the Division denied E's request for two more hours per day of supported living services "for lack of justification and supporting documentation."<sup>52</sup>

### ***D. Appeal***

E's guardians requested a hearing to challenge the reduction in E's day habilitation and supported living benefits.<sup>53</sup> The hearing for that appeal commenced on April 3, 2019 and was continued on April 5, 2019. A supplemental hearing was held on May 13, 2019.<sup>54</sup>

Assistant Attorney General Paul Peterson represented the Division. Eli Haroun, a Health Program Manager II, and Heather Chord, a Health Program Manager II, testified on behalf of the Division. E was represented by Nicholas Feronti, an attorney with Alaska Legal Services Corp. The following witnesses testified on E's behalf: S and D C, his guardians; J N, his caregiver; D T, his care coordinator; and C U, who provides nursing oversight and care management services for E.<sup>55</sup> There were no objections to any of the Exhibits.<sup>56</sup>

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<sup>49</sup> Exh. D, p. 2.

<sup>50</sup> Exh. D, p. 2.

<sup>51</sup> Exh. D, p. 2.

<sup>52</sup> Exh. D, p. 2.

<sup>53</sup> Exh. C, p. 1.

<sup>54</sup> During the pendency of this litigation, Mr. J's counsel requested oral argument concerning which party bore the burden of proof for the reduction in E's day habilitation hours. Both sides briefed this issue. However, on May 13, 2019, the Department issued a final decision in two cases -- OAH Case No. 19-0066-MDS and OAH Case No. 19-0014-MDS -- which discussed how the burden of proof should be allocated in this situation. Accordingly, Mr. J's request for oral argument on this issue was denied on May 16, 2019 and the Division's request for reconsideration was denied on May 22, 2019.

<sup>55</sup> Ms. U provided testimony concerning E's limitations. She stated that he should never be left alone and needs to be in sight and sound of somebody. See Testimony of Ms. U.

<sup>56</sup> However, Exhibit G for the reasons set forth herein was not considered when rendering this decision.

1. *The Division's Position*

At the hearing, the Division admitted that E needs a high level of services in light of his many challenges.<sup>57</sup> The Division's first witness was Eli Haroun, who reviewed the 2018-2018 POC and issued the January 8, 2019 denial letter.<sup>58</sup> He explained the basis for his decision to only allow 12 per week of day habilitation services and 70 hours per week of supported living services.

a. Day Habilitation Services

In assessing E's day habilitation request, Mr. Haroun reviewed the 2018-2019 POC, prior POCs for E, other assessments in the record, the ICAP assessment, and E's medical records.<sup>59</sup> According to Mr. Haroun, in order to get more than 12 hours per week of day habilitation, an individual would "need to show that the reduction in the hours would *substantially* impact the person's health and safety or lead to institutionalization within the coming year."<sup>60</sup> He noted that the "million dollar question" was whether reducing Es hours per week of day habilitation services would affect E's health and safety.<sup>61</sup> Mr. Haroun also stated that he was looking for some evidence that reducing E's day habilitation hours would put E "at a *massive risk*" of a decline in his health and safety.<sup>62</sup> However, Mr. Haroun saw "no red flag or any indication of a threat" which would allow him to authorize more than 12 hours per week of day habilitation services.<sup>63</sup>

Mr. Haroun further testified that the Division doesn't know if the reduction in day habilitation hours would have an impact on E's health and safety, but felt that it is "more likely than not that it will be O.K."<sup>64</sup> He said that since E is not left alone, he did not see how anything bad could happen.<sup>65</sup> Mr. Haroun also expressed consternation that E's care coordinator had

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<sup>57</sup> See Presentation of Paul Peterson, AAG; see also Testimony of Mr. Haroun.

<sup>58</sup> Mr. Haroun has 12 years of experience in behavioral and mental health fields and with intellectual disabilities. He has been a health care program manager for the Division for two years. He testified that his supervisor had reviewed the denial letter. See Testimony of Mr. Haroun.

<sup>59</sup> Testimony of Mr. Haroun.

<sup>60</sup> Testimony of Mr. Haroun (emphasis added).

<sup>61</sup> Testimony of Mr. Haroun.

<sup>62</sup> See Testimony of Mr. Haroun (emphasis added). Mr. Haroun later testified that he wanted to see some evidence in the POC that the reduction would affect E's medical or mental health – *i.e.*, if he wasn't out in the community, would he have a meltdown? See Testimony of Mr. Haroun.

<sup>63</sup> Testimony of Mr. Haroun.

<sup>64</sup> Testimony of Mr. Haroun.

<sup>65</sup> Testimony of Mr. Haroun.



declined to provide him with additional documentation regarding E's request for three hours of weekly day habilitation in excess of the 12-hour cap.<sup>66</sup>

*b. Supported Living Services*

Mr. Haroun testified that supported living services “must be majority or primarily habilitative” and that habilitative services involve skill building.<sup>67</sup> Since E was completely dependent on staff, Mr. Haroun viewed his requested supported living activities to be “more hands on” than skill building.<sup>68</sup> He also questioned how much habilitation E could work on, “given his limitations.”<sup>69</sup> In addition, Mr. Haroun pointed out that the Division had only approved 70 hours per week of supported living services under E's 2017-2018 POC and noted that the 2018-2019 POC had identical goals and objectives.<sup>70</sup>

Noting that supported living services are capped at 18 hours a day, Mr. Haroun explained that an individual's level of functionality was one factor he considered when determining the amount of supported living services that he should approve.<sup>71</sup> Mr. Haroun characterized E as “very low functioning.”<sup>72</sup> Accordingly, he felt that E needed services which involved physical assistance and supervision rather than skill building. Mr. Haroun testified that he considered the additional 14 hours being requested to be “hands on,” rather than habilitative. He noted that he would be comfortable in awarding extra hours of other services to E, just not habilitative services.<sup>73</sup>

Finally, Mr. Haroun testified that he had requested supporting documentation from E's care coordinator to see if the additional requested hours of supported living services could be justified. To that end, he requested: (1) one week of a recent 24- hour care calendar (within the last two weeks) which included all of E's activities provided through waiver and natural supports; and (2) two weeks of service notes within the last 30 days. However, Mr. Haroun

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<sup>66</sup> Testimony of Mr. Haroun; *see also* Exhibit J, p. 4.

<sup>67</sup> *See* Testimony of Mr. Haroun. According to Mr. Haroun, habilitative services involve “skill building.” *See* Testimony of Mr. Haroun.

<sup>68</sup> Testimony of Mr. Haroun.

<sup>69</sup> Testimony of Mr. Haroun.

<sup>70</sup> Testimony of Mr. Haroun.

<sup>71</sup> Testimony of Mr. Haroun. Mr. Haroun explained the when he uses the term “functionality,” he means how many things an individual could do on their own or by direct engagement. *See* Testimony of Mr. Haroun.

<sup>72</sup> Testimony of Mr. Haroun.

<sup>73</sup> Testimony of Mr. Haroun. Mr. Haroun testified that E would benefit from 84 hours of services a week but stated that this amount of *supported living services* was not justified. At various times during the hearing, the Division's counsel suggested that the Division would have provided E with PCA services, had such services been requested, in lieu of the additional supported living hours.

testified that the care coordinator had not provided the requested information, opining that the “professionals were not doing their job.”<sup>74</sup>

Under cross-examination, Mr. Haroun was asked why he had authorized 70 hours of supported living services. He responded by saying that he looked at whether the goals and objectives would be “worked on in a habilitative way.” Mr. Haroun then explained how many hours he allocated for each of the six goals related to E’s supported living services. He described this as an “informal process,” and admitted that it was not contained in the Division’s exhibits.

Mr. Haroun testified that he allotted:

- four hours per day, or 28 hours per week, to goal 1 (developing and building skills to enable E to learn and be involved in his self-care and well-being in the home);
- four hours per day, or 28 hours per week, to goal 2 (having E help with the chores around the house to the best of his ability);
- two hours per week to goal 3 (providing E with opportunities for socialization);
- and
- two hours per day to goal 5 (increase his drumming skills).

Mr. Haroun allocated no hours to goal 4 (having E use positive communication to let E’s thoughts or frustrations be known each day) or goal 6 (having E learn to use modern technology to increase his independence). Upon further questioning, Mr. Haroun testified that E had to be working on the goal, rather than having it done for him, in order for hours to be allotted to that goal. Mr. Haroun, however, acknowledged that his informal calculations totaled 72 hours per week, not 70 hours.<sup>75</sup>

The Division’s other witness, Heather Chord, testified at the Supplemental Hearing. The purpose of the Supplemental Hearing was elicit testimony regarding additional documents – *i.e.*, Exhibits G-J – which the Division had submitted in support of its position after the hearing.<sup>76</sup>

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<sup>74</sup> Testimony of Mr. Haroun. Mr. Haroun stated that after he issued the denial letter, he had filed a Quality Assurance Report on the care coordinator because she had failed to provide the requested information.

<sup>75</sup> After admitting that his allotment totaled 72 hours a week, Mr. Haroun said that might not have been his final assessment. However, he did provide any further information regarding how he arrived at his decision to authorize 70 hours – rather than 72 hours – of supported living services. *See* Testimony of Mr. Haroun.

<sup>76</sup> The Division was asked to produce an appropriate witness to identify what Exhibit G was, who compiled it and how it was compiled, and how the document related to the Division’s position. *See* Order dated April 24, 2019. The Division’s counsel produced Heather Chord as its witness to address these issues. Ms. Chord testified that she did not compile Exhibit G but could speak to the “basic idea.” However, upon further questioning, she admitted that she did not know what some of the columns meant in Exhibit G. *See* Testimony of Ms. Chord. Accordingly, Exhibit G has not been considered in rendering this decision.

During her testimony, Ms. Chord also was questioned as to whether Es 2018-2019 POC had been “incomplete” as Mr. Haroun had claimed in e-mails to E’s care coordinator.<sup>77</sup> She explained that while there was no regulation requiring a 24-hour care calendar to be submitted with a POC, the Division sometimes looks at such a calendar to justify the services being requested. She further stated that providers are required to keep service notes, which list the date and time of the service provided, who provided the service, what goals and objectives were worked on, and how the service provided relates to the goals, and identifies the activity. Ms. Chord said that the Divisions makes its determination about a POC based on the documents they have. Consequently, if the Division does not receive requested documents in a timely manner, “you are out of luck” and the care coordinator must file an amended plan. She also stated that was typical for the Division to ask for supporting documentation to justify a higher level of care.<sup>78</sup>

## 2. *E’s Position*

E’s witnesses described how day habilitation is vital to E’s mental health and safety. In addition, E’s witnesses explained why he needed more than 70 hours of supported living services per week.

### 1. Day Habilitation

E’s first witness was J N, E’s paid caregiver. Ms. N has been working with E since November of 2017. She typically works 20 hours each week and serves as E’s day habilitation provider Mondays through Fridays; she also provides respite care.<sup>79</sup> She characterized E as incredibly bright in his ability to learn and remarked on how personable he can be.<sup>80</sup>

Ms. N testified that E has physical, emotional, and behavioral challenges and cannot access the community on his own. She works on E’s socialization skills by getting him into the community through day habilitation. She uses that time to teach E to communicate clearly and respectfully with others.<sup>81</sup> During the first six months when she started working with E, he frequently had public outbursts. For example, if they went to a store and the store didn’t carry an item, E would loudly lash out and call the people “liars” and “idiots.” Ms. N has worked with E

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<sup>77</sup> See Testimony of Ms. Chord; Exh. J.

<sup>78</sup> Testimony of Ms. Chord.

<sup>79</sup> Testimony of Ms. N; Testimony of Ms. C.

<sup>80</sup> Testimony of Ms. N

<sup>81</sup> Ms. N testified that she coaches E to speak in complete sentences when he is in the community so that others outside of his immediate family can understand him. See Testimony of Ms. N.

to express his emotions in a respectful way by explaining that calling a person names or using an elevated tone is not appropriate and modelling good behavior. Sometimes she has had to remove him physically from the immediate area and must hold that discussion in a private area. She has noticed an improvement in E's social skills over time and testified that the day habilitation has helped him progress.<sup>82</sup>

Ms. N further testified that if E misses a day of day habilitation due to illness or the weather, it has a huge emotional impact on him and may affect him for up to a week. E will get angry and earlier issues are triggered. He will bring up things from the past – even as far back as high school. In Ms. N's opinion, taking away three hours of E's weekly day habilitation hours would, more likely than not, result in his regression because he needs repetition, constant engagement, and the redirection.<sup>83</sup>

Ms. N also described E's day habilitation activities. She accompanies E when he goes to day habilitation facilities three days a week, usually Monday, Wednesday, and Friday. This allows him to interact with the staff and his peers. When she is in the community with E, she coaches him to be more articulate, tries to get him to explain things to people and to answer questions. She explained that E likes painting and attends a one-hour class; she helps him paint and he shows his art, explains it and why he likes it. She also brings him to bowling in the winter every other Friday. Ms. N puts the bowling ball on a rack so he can place his finger on it, and he tells her where to aim it. She reported that E enjoys it when the ball strikes the pins because he is competitive and that he enjoys the social interaction at the bowling alley. In addition, E attends cooking classes, pottery classes, occasionally goes shopping, and attends bingo. He also goes to baseball games during the summer and is the unofficial mascot of the Mat-Su Miners baseball team.<sup>84</sup>

Ms. N's typical outings with E involve three hours for the activity and an additional hour of transportation to and from the outing.<sup>85</sup> She uses 10-12 hours of the weekly day habilitation hours for these outings; E's mother uses the remaining day habilitation hours. Day habilitation,

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<sup>82</sup> Testimony of Ms. N.

<sup>83</sup> Testimony of Ms. N.

<sup>84</sup> Testimony of Ms. N.

<sup>85</sup> Testimony of Ms. N. Ms. N says that it takes 10-15 minutes to get E into the van and 15 to 20 minutes for the drive and then he needs to be unloaded from the van.

Ms. N said, provides E with a sense of community.<sup>86</sup> Day habilitation also keeps E interactive and allows him to develop his social skills and express his interests.<sup>87</sup>

According to Ms. N, E's safety and his mental health go hand-in-hand and losing day habilitation hours would affect his mental health. E's mental health affects his other goals, such as his communication. Ms. N also reported that when E is unhappy, he has hurt himself through scratching. Ms. N concluded her testimony by stating that day habilitation hours are necessary for E's mental state and his well-being because he cannot access the community on his own.<sup>88</sup>

S C, E's mother and guardian also engages in day habilitation services with E. She stated that E is very social and likes to go places. She takes him to church, sporting events, to restaurants, and to Walmart on the weekends when Ms. N is not available. Ms. C noted that E "knows he is not normal, but he likes to do what normal people do."<sup>89</sup> She testified that reducing E's day habilitation hours would harm his mental health and affect his socialization skills, which need continual reinforcement and repetition. If he is frustrated, E will take it out on others within earshot. She stated that if J N is unable to take him to day habilitation, E's emotional demeanor changes: he talks about past trauma and will verbally lash out at others. She noted that E is very much like a five-year old, in that his skills require continual reinforcement. If he lost three hours of day habilitation per week that would be one whole day's outing, Ms. C said.<sup>90</sup>

D C, E's stepfather and guardian, testified that E thrives on verbal interaction. If he does not receive it, he "spirals out of control" and uses racial slurs and inappropriate language and needs active oversight to redirect him to be polite. Verbal interaction, Mr. C said, is E's "only connection with the world and his environment." If his sense of community is taken away, his mental health and safety are at risk since he lashes out and connects with past trauma, Mr. C said. When E lacks connection with others, he will rub his head on his pillow until he gets a sore spot and will scratch himself.<sup>91</sup>

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<sup>86</sup> Testimony of Ms. N.

<sup>87</sup> Testimony of Ms. N.

<sup>88</sup> Testimony of Ms. N.

<sup>89</sup> Testimony of Ms. C.

<sup>90</sup> Testimony of Ms. C.

<sup>91</sup> Testimony of Mr. C.

Both S and D C expressed concern about their ability to care for E given his intense needs. Ms. C said that taking care of E is “emotionally draining” and, at age 59, she worries about her long-term ability to care for him.<sup>92</sup>

## 2. E’s Supported Living Services

D T has been E’s care coordinator for approximately two years.<sup>93</sup> She testified that it was her duty to apply for any and all services that might benefit E.<sup>94</sup> She also noted that she never tells her clients which services they should need or want, since that is up to them.<sup>95</sup>

Ms. T first met E and his guardians when E was living in a group home. Ms. T worked with the Cs to develop the 2017-2018 POC, which they believed would support E in his transition from the group home to the C’s home. Although she and the Cs thought that E needed more services than the 84 hours of supported living to complete E’s goals, they “compromised” by only requesting 12 hours per day of supported living Services.<sup>96</sup> However, only 10 hours per day of supported living services were approved under the 2017-2018 POC.<sup>97</sup>

When it came time to submit the 2018-2019 POC, the consensus was that 10 hours per day of supported living did not meet E’s needs. The team agreed to ask for 12 hours per day of supported living services again, although Ms. T believes he would benefit from the maximum allowable amount of supported living services – *i.e.*, 18 hours per day. She noted that E wants to participate actively in his community and his household. She said that E and his family wanted skill-building and socialization services rather than hands-on services. She also pointed out that for a long time E hadn’t had the opportunity to work on skill-based services.<sup>98</sup>

S C also testified about E’s request for 12 hours per day of supported living in the 2018-2019 POC. She stated that she asked for 84 hours of supported living per week because it was obvious that they did not have enough help. She said in order to sustain E’s living at home, he needs to have more help. Ms. C further stated that E “needs at least 84 hours of supported

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<sup>92</sup> Testimony of Ms. C; Testimony of Mr. C.

<sup>93</sup> Ms. T works for Alaska Independent Care Coordination. She has been a care coordinator for three years, has a degree in health care, has worked in emergency medicine, and has worked in social services throughout her career. She works with 40 individuals, including Mr. J. *See* Testimony of Ms. T.

<sup>94</sup> Testimony of Ms. T.

<sup>95</sup> Testimony of Ms. T.

<sup>96</sup> Testimony of Ms. T.

<sup>97</sup> Testimony of Ms. T; *see also* J Exh. 000061.

<sup>98</sup> Testimony of Ms. T.

living” per week to achieve his goals. She described taking care of E as “emotionally draining.”<sup>99</sup>

### III. Discussion

#### A. Day Habilitation Services and the applicable Regulation

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.”<sup>100</sup> The Division must approve each specific service as part of the Waiver recipient’s POC.<sup>101</sup>

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.<sup>102</sup>

The regulation applicable to day habilitation services was amended in October 2017.<sup>103</sup> 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.”<sup>104</sup> 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.<sup>105</sup> Accordingly, the Division’s determination to reduce E’s day habilitation services to 12 hours per week must be evaluated under this standard.

#### B. Burden of Proof *Vis-à-vis* Day Habilitation Services

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.<sup>106</sup> However, this case involves a change to the regulation controlling the provision of day habilitation services, which now requires hours

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<sup>99</sup> Testimony of Ms. C.

<sup>100</sup> 7 AAC 130.217(b)(1); *see also* Exh. B, p. 6.

<sup>101</sup> 7 AAC 130.217(b); *see also* Exh. B, p. 6.

<sup>102</sup> 7 AAC 130.260(b); *see also* Exh. B, p. 17.

<sup>103</sup> 7 AAC 130.260(c)(Regulation in effect as of October 1, 2017; Register 223).

<sup>104</sup> 7 AAC 130.260(c)(emphasis added); *see also* Exh. B, p. 17.

<sup>105</sup> 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>.

<sup>106</sup> 7 AAC 49.135.

in excess of 624 hours per year (an average of 12 hours per week) be justified by health, safety, or institutionalization concerns.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

A review of E's prior POC (2017-2018) reveals four goals: ( 1) engage in community activities of interest to him; (2) maintain his maximum level of independence while participating in community activities; (3) develop coping skills; and (4) develop and build skills to enable him to learn and be involved in his self-care *and well-being* in the community.<sup>110</sup> Thus, there are goals in E's prior POC which are directly related to emotional/mental health and safety concerns.<sup>111</sup>

Although the Division's witness testified that E must show the reduction in his day habilitation hours would *substantially* impact his health and safety and put him at a "massive risk" of a decline in terms of his health and safety, that is not the standard set forth in the regulations.<sup>112</sup> The standard in the regulation is lower: it only requires that the hours be *necessary* for E's health and safety.<sup>113</sup> As a result, the Division has the burden of proof to demonstrate that reducing E's day habilitation hours from the 15 hours he received under the prior POC (2017-2018) will not place his health and safety at risk or put him at risk of institutionalization.

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<sup>107</sup> See 7 AAC 130.260(c).

<sup>108</sup> See 7 AAC 130.260(c).

<sup>109</sup> See 7 AAC 130.260(c).

<sup>110</sup> Exh. E, pp. 24-27 (emphasis added).

<sup>111</sup> For example, one of the objectives under these goals was to develop refrain from outbursts when frustrated and another objective was for E to communicate his needs. See Exh. E, p. 26.

<sup>112</sup> See Testimony of Mr. Haroun.

<sup>113</sup> See Exh. B, p. 17.



***C. Are More than 12 Hours per Week of Day Habilitation Services Necessary to Protect E’s Health and Safety or to Prevent Institutionalization?***

Although the revised regulation limits the number of weekly habilitation hours to 12 unless more is necessary to protect the recipient’s health and safety or prevent institutionalization, the regulation does not define or quantify the protection to health and safety, or the risk of institutionalization associated with this exception. In this case, the risk of institutionalization is not at issue.<sup>114</sup> Thus, the question is whether reducing E’s hours to the “cap” will result in a risk to his health and safety. The answer to that question is yes.

The evidence, in summary, establishes that:

- A. E requires assistance to engage with the community;<sup>115</sup>
- B. When his access to the community is reduced, E’s mental and emotional health declines;<sup>116</sup> and
- C. When E’s access to the community is reduced, his coping skills decline, thereby threatening his safety.<sup>117</sup> There was ample evidence in the record to show that E lashes out inappropriately, using pejorative terms and engaging in name calling if he is upset or frustrated.<sup>118</sup> E also has engaged in self-harming behaviors.<sup>119</sup>

The evidence shows that E is sociable and thrives on being out in the community, but requires the presence of trained staff who can provide him with appropriate prompts and cues about how to interact socially in a non-offensive fashion<sup>120</sup> Because of this, E’s day habilitation services have largely focused on increasing E’s social skills and coping skills.<sup>121</sup> The testimony of E’s witnesses is unequivocal: E’s emotional and mental health has declined whenever he has received less than 15 hours a week of day habilitation services.<sup>122</sup> He recalls prior trauma, has verbal outbursts, and engages in self-harming behavior.<sup>123</sup>

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<sup>114</sup> There was no evidence in the record suggesting that E was at risk of institutionalization if his day habilitation hours were reduced to 12 hours per week.

<sup>115</sup> Testimony of Ms. U (E is non-ambulatory, has no fine motor skills, has no ability to adjust his position or to do transfers, and should never be left alone).

<sup>116</sup> Testimony of Ms. N; Testimony of Ms. C; Testimony of Mr. C.

<sup>117</sup> See Testimony of Ms. N; Testimony of Ms. C; Testimony of Mr. C.

<sup>118</sup> See Testimony of Ms. N; Testimony of Ms. C.

<sup>119</sup> See Testimony of Mr. C (he rubs head back and forth on the pillow until it creates a sore spot and he moves his left hand up to his face and scratches himself); Testimony of Ms. C (stating that E will “hurt and scratch himself” if he is not happy).

<sup>120</sup> See Exh. E, p. 24.

<sup>121</sup> See Exh. E, pp. 25-2.6.

<sup>122</sup> See Testimony of Ms. N; Testimony of Ms. C.

<sup>123</sup> Testimony of Ms. N; Testimony of Ms. C.

The Division has the burden of proof. It has not shown that reducing E's hours to the 12-hour cap will not result in a risk to his health and safety.<sup>124</sup> Essentially, the Division is simply saying that E has improved since moving back with the Cs and that he will continue to do well if his hours are reduced.<sup>125</sup> This is simply pure speculation on the Division's part and insufficient to meet its burden of proof. Instead, the evidence shows that it is more likely true than not true that reducing E's day habilitation hours to 12 hours a week will jeopardize his health and safety.

Accordingly, because the Division has not met its burden of proof, E should continue receiving 15 hours per week of day habilitation services – *i.e.*, the same number of hours he received under his prior POC (2017-2018).

#### ***D. Supported Living Services and the Applicable Burden of Proof***

Supported living services can be provided in the recipient's own home. They fall into the general category of residential habilitation services.<sup>126</sup> The services have to be "provided in accordance with the department's "Residential Habilitation Services Conditions of Participation."<sup>127</sup> The *Conditions* document, which is adopted into regulation, states:

Residential habilitation services may be provided to assist recipients to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to live in the most integrated setting appropriate to the recipient's need. These services must be individually tailored, and may include personal care and protective oversight and supervision, in addition to skills development.<sup>128</sup>

Thus, while the residential habilitation services must have a skill-building component, these services also may have a personal care, protective oversight, and supervision component.<sup>129</sup>

Here, E bears the burden of proving that he should receive 14 additional hours per week of supported living services over his prior allocation, which the Division approved under the 2017-2018 POC.<sup>130</sup> He has met that burden regarding receiving 2 additional hours of supported living services per

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<sup>124</sup> Compare Testimony of Mr. Haroun (admitting that he does not know if reducing E's day habilitation hours will have an impact and that this is the "million dollar question") with Testimony of Ms. N (describing how E's mental and emotional health have declined if he is unable to attend day habilitation).

<sup>125</sup> See *supra*, page 9 (summarizing Mr. Haroun's testimony).

<sup>126</sup> 7 AAC 130.265(a)-(b).

<sup>127</sup> 7 AAC 130.265(a)(2)

<sup>128</sup> See <http://alaska.gov/dsds/Documents/regspackage/ResidentialHabilitationServicesCOP.pdf>.

<sup>129</sup> Although Mr. Haroun testified that supported living services must be "*primarily* habilitative" or skill-building, neither the regulation nor the Conditions of Participation define residential habilitation services so narrowly. See Testimony of Mr. Haroun (emphasis added).

<sup>130</sup> See 7 AAC 49.135(stating that for additional benefits, the burden of proof is on the recipient requesting the services).

week. This is because Mr. Haroun, the Division's witness, provided detailed testimony regarding how he determined the number of hours of supported living services that E should receive under the 2018-2019 POC.<sup>131</sup> However, the number of hours he allotted to those goals which he concluded were habilitative in nature totaled 72 hours per week, not 70 hours, of supported living services. Mr. Haroun then failed to adequately explain why he only authorized 70 hours per week of supported living services when his own calculations justified 72 hours of such services.<sup>132</sup>

As to the remaining 12 hours per week of supported living services, E did not meet his burden of proof. Although the Cs and Ms. T repeated said that E needed those extra 14 hours a week of supported living services, they produced no evidence justifying this increase.

E's care coordinator was asked to provide additional documentation, in the form of a 24-hour care calendar and two weeks of recent service notes, at the time the 2018-2019 POC was under review but elected not to do so.<sup>133</sup> Ms. Chord testified that it was not unusual for the Division to request additional documentation when a recipient was requesting a high number of supported living hours.<sup>134</sup> Notably, E was requesting 14 additional hours a week to accomplish the *very same goals and objectives* set forth in the prior POC when the Division awarded 70 hours of supported living services.<sup>135</sup> Consequently, it is only reasonable that Mr. Haroun would have wanted to see documentation demonstrating why 14 additional hours per week were needed for E to accomplish the same goals and objectives that he had under the prior POC.

Although E's counsel intimated that the additional documents had not been turned over to the Division because the Division at other times had reduced existing services after reviewing such documents, such a strategy is risky at best.<sup>136</sup> Here, it ensured that E did not meet his burden of proof in showing that his allotment of supported living services under the 2018-2019 POC should be increased by 14 hours per week over what he received during the prior POC.

#### **IV. Conclusion**

The Division sought to reduce E's day habilitation services to an average of 12 hours per week. Because E's witnesses established that E's prior POC demonstrated a need for hours in excess of 12 per week due to health and safety concerns, the Division had the burden of proof regarding reducing E's

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<sup>131</sup> See Testimony of Mr. Haroun.

<sup>132</sup> See Testimony of Mr. Haroun.

<sup>133</sup> See Exh. J; *see also* Testimony of Mr. Haroun.

<sup>134</sup> Testimony of Ms. Chord.

<sup>135</sup> Compare J Exhs. 000079-000081m 999983-000085 with Exh. E, pp. 16 & 18-20.

<sup>136</sup> Closing Argument of Nicholas Feronti.

services to the 12-hour “cap.” The Division did not meet its burden. Instead, the evidence shows that E has a continued need for day habilitation services in excess of the “cap.”

E, however, bears the burden of proof for showing that he needs 14 additional hours per week of supported living services beyond what he received under his 2017-2018 POC for the same goals and objectives. He only met that burden as to 2 of the requested additional 14 hours per week.

Accordingly, the Division is to provide E with 15 hours per week of day habilitation services and with 72 hours per week of supported living services.

Dated: July 30, 2019

*Signed* \_\_\_\_\_  
Kathleen A. Frederick  
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 11<sup>th</sup> day of September, 2019.

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.]