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

In the Matter of	)	
	)	
S D	)	OAH No. 19-0125-MDS
	)	Agency No.

DECISION

I. Introduction

S D is a 37-year-old man who receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. Except for a 6-month decrease in 2018, he has received an average of 20 hours per week of day habilitation services for many years. S applied to renew his POC for 2019 – 2020 and requested that he continue to receive 20 hours per week of day habilitation services. The Division of Senior and Disabilities Services approved the plan of care overall but reduced his day habilitation hours to 12 hours per week. S's parents and guardians challenged the Division's decision.

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 risk to his health and safety without additional day habilitation hours. The evidence shows that S undoubtedly needs supervision and one-on-one support that historically, has been provided, at least in part, through day habilitation services. The evidence does not, however, show that S faces institutionalization or risk to his health and safety if his day habilitation hours above the regulatory maximum are not approved. Accordingly, the Division's decision to deny the additional day habilitation hours is AFFIRMED.

II. Facts

A. Background

S is 37 years old. He is intellectually disabled and experiences autism, anxiety, and attention deficit hyperactivity.[1] He is six foot one, 190 pounds, and physically capable.[2] He has issues with balance and coordination, but he can usually navigate any terrain without the need for assistive devices.[3] Although he can move through most surroundings, he lacks good judgment and is unable to recognize or appreciate dangers.[4] S struggles with organization, planning, impulsivity, money management, and

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1 Ex. E at 4, 16.
2 Ex. E at 3, 13.
3 Ex. E at 13.
4 Ex. E at 13.

completion of multiple-step tasks.[5] He also has problems with distractibility and social judgment, and he has difficulty learning from aversive consequences.[6] He does not retain skills, and teaching him basic skills that most people take for granted is a repetitive process.[7] S requires prompting to complete basic day-to-day activities, such as getting dressed, putting on his shoes, or completing his hygiene routine.[8] S is shy and has severe trust issues that impede his ability to interact socially.[9] He requires full time sight and sound supervision, coaching and assistance for health, safety, and general well-being.[10] His most recent Inventory for Client and Agency Planning (ICAP) scoring reflects an overall score of 67, which indicates a need for "regular personal care and/or close supervision."[11]

S lives with his parents, C and Y D.[12] He has good natural supports, and his parents have provided significant and consistent support since he was born.[13] S's mother is his primary Medicaid-paid care provider.[14] S's sister lives next door, and S knows that he can go to his sister's house for help any time he needs to.[15] His family, including his parents, sister, and brother-in-law, help each other to ensure that S's needs are met and that he is never left unsupervised.[16]

S is very healthy, with no medical problems over the past year.[17] He has not had any emergency room visits, hospitalizations, or surgeries.[18] He has had no critical incidents.[19] And there are no planned or anticipated surgeries or procedures for the plan year.[20] The lack of critical incident reports, ER visits, hospitalizations, or surgeries is largely attributable to the fact that S receives constant supervision and consistent assistance through his natural supports and Waiver services.[21]

S struggles with obsessiveness, which quickly leads to anger without redirection or assistance to resolve.[22] S gets extremely angry and frustrated when he does not get what he wants.[23] When S gets

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5 Ex. E at 15, 44-47.
6 Ex. E at 15.
7 C D Testimony; Ex. E at 47.
8 Ex. E at 6, 44-47; Y D Testimony.
9 Ex. E at 15; B Z Testimony.
10 Ex. E at 12; B Z Testimony.
11 Ex. E at 3.
12 Ex. E at 3.
13 Ex. E at 6.
14 Ex. E at 21.
15 Ex. E at 6.
16 Ex. E at 6; Y D Testimony.
17 Ex. E at 3.
18 Ex. E at 3.
19 Thea Howard Testimony.
20 Ex. E at 3.
21 Y D Testimony; B Z Testimony.
22 Ex. E at 15.
23 Ex. E at 47; C D Testimony.

angry, he yells at his mother, grinds his teeth, clenches his fists, stomps away, and slams doors.[24] Ms. D is proactive with S's problem behaviors and generally knows how to avoid triggers or redirect S to something positive to keep incidents to a minimum.[25] Ms. D is reluctant to document S's problem behaviors.[26] As noted, S has trust issues with new people.[27] He gets overly anxious over any new event.[28] When approached by someone he does not know, he is generally quiet and will not answer questions.[29] S is generally cooperative, but due to poor awareness of social cues, some of his behaviors are socially inappropriate.[30] There is no evidence that S harms himself or others, and no other behavioral issues are noted.

S's safety, when left alone in the community or at home, is a concern.[31] He is unable to comprehend safety issues.[32] He is highly distractible and may wander off and get lost or in trouble.[33] S does not understand money or shopping.[34] He is vulnerable to theft or being taken advantage of.[35] He has a tendency to pick up objects he wants and bring them to his parents.[36] He has brought items out of a store to show his parents without paying.[37] His parents worry that if out in the community alone, S would run afoul of loss prevention or store security people.[38] Due to his trust issues and his inability to talk to new people, S would not be able to explain himself.[39] And he would not be able to answer questions, such as his full name, telephone number, address, etc.[40] S's parents fear that he would panic and get aggressive or uncooperative in response to any physical handling or a barrage of questions from strangers.[41] His parents also worry that he would end up in jail.[42] S requires one-on-one supervision, coaching, and assistance when out in the community.[43]

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[24] C D Testimony.
[25] Ex. E at 15; C D Testimony; B Z Testimony.
[26] C D Testimony.
[27] Ex. E at 15; B Z Testimony.
[28] Ex. E at 7.
[29] Ex. E at 15.
[30] Ex. E at 7.
[31] Y D Testimony; C D Testimony.
[32] Ex. E at 12.
[33] Ex. E at 46.
[34] Ex. E at 46; C D Testimony.
[35] C D Testimony.
[36] C D Testimony.
[37] C D Testimony.
[38] C D Testimony; Y D Testimony.
[39] Y D Testimony.
[40] Y D Testimony.
[41] Y D Testimony.
[42] C D Testimony; Y D Testimony.
[43] Ex. E at 27; C D Testimony; Y D Testimony.

B. S's IDD Plans of Care

S receives waiver services through the IDD program. His services include supported living, individual day habilitation, daily respite, and hourly respite. S's day habilitation services are the subject of the current dispute.[44]

1. S's Historical Use of Day Habilitation Services and Changes to the Day Habilitation Regulation

S received an average of 20 hours per week of day habilitation services for many years.[45] Day habilitation services are beneficial to S to promote physical activity, socialization, and life skills.[46] The primary focus of S's day habilitation is to provide him with access to recreational and leisure activities.[47] His goals and objectives emphasize physical activities for health and fitness, access to the library to practice reading skills, and opportunities to work on money management, shopping, personal awareness, and socialization.[48]

In 2017, the Department of Health and Social Services amended certain Medicaid regulations, including the regulation governing day habilitation hours. That amended regulation, which went into effect on October 1, 2017, reads:

> 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
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> (1) requested in a recipient's plan of care; and
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> (2) justified as necessary to
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> (A) protect the recipient's health and safety; and
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> (B) prevent institutionalization.[49]

Before October 2017, there was no cap for day habilitation services.

In response to the new regulation, in January 2018, the Division reduced S's day habilitation hours to 12 hours per week.[50] To make up for the reduction in Waiver service hours, S's family rearranged work schedules to make sure that S was never left unsupervised.[51] S's parents, sister, and brother-in-law continued to provide the same consistent, one-on-one care S received before the

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44 Ex. D at 1.
45 C D Testimony; Y D Testimony.
46 Ex. 1; Ex. E at 48.
47 Ex. E at 27.
48 Ex. E at 27.
49 7 AAC 130.260(c).
50 C D Testimony; Y D Testimony; Ex. E at 12.
51 C D Testimony; Y D Testimony.

regulation was amended.[52] As a result, S did not suffer any new risks, and there were no incidents to document.[53]

After litigation over procedural errors in how the new regulation was implemented, the Department 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.[54]

In July 2018, after settling the litigation, the Division reinstated S's day habilitation services to 20 hours per week.[55] The Division warned S's care team that the day habilitation hours could still be reduced to the regulatory cap in the future.[56] After his day habilitation hours were reinstated, S used nearly all the hours allowed for day habilitation services—averaging 19.36 hours per week.[57]

2. S's 2019 – 2020 Plan of Care

S's team submitted his POC for January 11, 2019 through January 10, 2020 to the Division.[58] In that POC, he requested that he continue to receive an average of 20 hours of day habilitation services per week (4140 15-minute units for the year).[59] His day habilitation goals and objectives emphasize time management skills to work on his distractibility, physical activities for health and fitness, access to the library to practice reading skills, money management to learn how money works in daily living, access to the post office to identify his post office box and retrieve his mail, and socialization in a creative environment.[60] S's 2019—2020 POC noted that the day habilitation services will provide S with "the opportunity for learning skills important for greater independence in all areas of community living including but not limited to: shopping, money management, personal awareness, and socialization

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52 C D Testimony; Y D Testimony.

53 C D Testimony; Y D Testimony.

54 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 parties are also directed to the July 2018 settlement agreement filed in *R. L., et. al., v. State, DHSS, DSDS*, U.S. District Court for the District of Alaska Case No. 1:18-CV-00004-HRH.

55 C D Testimony; Y D Testimony; Thea Howard Testimony.

56 Thea Howard Testimony.

57 Ex. G.

58 Ex. E.

59 Ex. E at 27.

60 Ex. E at 27-33.

skills."[61] When working on day habilitation, S and his mom make it a point to go to places where he can meet peers and maintain friendships or make new friends.[62] S cannot be in the community without full support and supervision.[63]

S's family's circumstances have changed since the first half of 2018, when S's day habilitation hours were last reduced.[64] S's sister has started full-time employment and is no longer available to help for the same amount of time she was in early 2018.[65] The family can no longer assure that someone will always be available to cover the 8-hour reduction in day habilitation services.[66]

S's 2019—2020 POC noted the previous reduction in S's day habilitation hours and his guardians' strong belief that S needs to regain his previously available service levels.[67] His parents/guardians believe that S is at severe risk of physical and mental health issues if he cannot get out with supports.[68] S's care team believes that he will regress if his day habilitation hours are reduced again.[69] If he does not have the opportunity to repeatedly practice skills in the community, he is at risk of losing what he has learned by not being challenged.[70] His primary care physician, Dr. David Barnes opines,

> It is important that S has regular physical activity otherwise he will be a risk for depression and exploitation. S is a vulnerable adult who is unable to access the community without one-one support and assistance. If he is in the community without supervision, he is at high risk for being taken advantage of. He will also be at risk for increased mental and physical health decline without supportive access from his caregivers. He is doing well at home and in the community with his caregivers.
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> . . . Any decrease in hours may lead the patient into being institutionalized. . ..[71]

C. The Division's Review and Partial Denial

On January 24, 2019, the Division notified S's parents that his day habilitation hours would be reduced to12 hours per week, and that the request for the other 8 hours per week of day habilitation hours was denied.[72]

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61 Ex. E at 27.
62 Ex. E at 12.
63 Ex. E at 27.
64 Y D Testimony; C D Testimony.
65 Y D Testimony; C D Testimony.
66 Y D Testimony; C D Testimony.
67 Ex. E at 12; Y D Testimony; C D Testimony.
68 Ex. E at 12; Y D Testimony; C D Testimony.
69 Y D Testimony; C D Testimony; B Z Testimony.
70 B Z Testimony.
71 Ex. E at 48; *see also* Ex. 1.
72 Ex. D.

The denial letter cited the changed regulation for day habilitation services and provided a link to all the Medicaid waiver regulations.[73] The Division gave several reasons for its denial.

First, the Division found no risk of institutionalization:

> [B]ased on thorough review and in consideration of S's overall health, living environment, all supports and services available to him, assessed level of care, and needs as presented in the plan, the Division determines that a limited number of additional Day Habilitation hours are not justified as necessary to prevent institutionalization within the plan of care year.[74]

Second, the Division found no risk to S's health and safety if the 8 additional hours were not approved.[75] The Division acknowledged Dr. Barnes' opinion that S needs regular physical activity or he will be at risk for depression and exploitation.[76] The Division noted that S's POC lists only one goal related to physical activity (i.e. bowling, walking, or chopping wood), and citing the American Medical Association (AMA), concluded that 2.5 to 5 hours per week is sufficient to address Dr. Barnes' health and safety recommendation.[77]

Third, in a confusing analysis of "a reasonable amount of time for S to complete the habilitative tasks with the frequency described in the goals and objectives," the Division questioned how S would be able to fill the weekly time requested.[78] The Division incorrectly noted, "S utilized Individual Day Habilitation at a weekly average of 15.8 hours, even after his hours were restored to the previously authorized levels." [79] The Division then noted that the two weeks of service notes provided by S's team were not useful "because they appear to show an extreme over-utilization of amounts authorized."[80] The Division concluded that the approved level of services meets S's needs: "Progress data and service utilization history indicate that S is doing well with a weekly amount of Individual Day Habilitation well below the amount requested."[81]

Finally, the Division noted that the Waiver program is a payor of last resort.[82] The Division explained:

> The renewal plan and supporting documentation lack information about what other community supports have been explored and exhausted prior to requesting an

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[73] Ex. D at 2.
[74] Ex. D at 2.
[75] Ex. D at 3.
[76] Ex. D at 3.
[77] Ex. D at 3.
[78] Ex. D at 3.
[79] Ex. D at 3. As noted, Y's weekly average after his hours were restored to the previously authorized levels was 19.36 hours per week. Ex. G at 7.
[80] Ex. D at 3.
[81] Ex. D at 3.
[82] Ex. D at 3.

exception to the regulatory maximum of day habilitation allowed. S lives with his parents, his mother is his main paid provider of HCB Waiver services, and he has other family members who sometimes act as a paid provider as well.[83]

Ultimately, the Division concluded that S's team had not demonstrated that S's needs meet the criteria for an exception to the regulatory maximum amount of day habilitation allowed.[84] Therefore, the Division denied Individual Day Habilitation for 8 hours per week for 52 weeks, or 1,664 units.[85]

D. Appeal

S's parents/guardians requested a hearing to challenge the reduction in S's day habilitation benefits. That hearing was held on April 8, 2019. Medicaid Program Specialist Terri Gagne represented the Division. Division Health Program Manager Thea Howard testified for the Division. S was present, and his parents and court-appointed guardians, Y and C D represented him and testified on his behalf. B Z, S's Medicaid Care Coordinator also testified on his behalf. All exhibits were admitted without objection.

III. Discussion

A. Day Habilitation Services and Applicable Regulation

The Medicaid Waiver program pays for specified individual services to Waiver recipients, if each of those services is "sufficient to prevent institutionalization and to maintain the recipient in the community."[86] The Division must approve each specific service as part of the Waiver recipient's POC.[87]

The type of waiver services at issue here, day habilitation services, are provided outside the recipient's residence. The purpose of these services is to assist the recipient with acquiring, retaining, or improving his or her self-help, socialization, behavior, and adaptive skills. They may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.[88]

As discussed above, before October 2017, the applicable regulations did not limit the number of day habilitation hours available to a recipient.[89] In October 2017, 7 AAC 130.260(c)—the regulation governing the day habilitation services—was amended.[90] Under the amended regulation, any more than

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83 Ex. D at 3.
84 Ex. D at 3-4.
85 Ex. D at 4.
86 7 AAC 130.217(b)(1).
87 7 AAC 130.217(b).
88 7 AAC 130.260(b).
89 7 AAC 130.260(c). (Regulation in effect from July 1, 2013 through September 31, 2017).
90 7 AAC 130.260(c) (emphasis supplied). (Regulation in effect as of October 1, 2017; Register 223).

12 day habilitation hours per week must be justified by health and safety concerns and by a showing that without the additional day habilitation services, the recipient will face institutionalization. Through a settlement agreement, the Department has agreed to temporarily review requests for day habilitation services 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.[91]

B. Burden of Proof

Under 7 AAC 49.135, in cases where the Division proposes to reduce the level of services, the Division bears the burden of proving that the evidence supports the reduction.[92] But here, the reduction in hours was due to a change in the regulation controlling the provision of day habilitation services. As noted above, that regulation requires that hours over 624 hours per year (an average of 12 hours per week) be "justified as necessary" to protect the recipient's health and safety or prevent institutionalization.[93]

Because 7 AAC 49.135 squarely places the burden of proof on the Division in cases where the Division seeks to reduce benefits,[94] and the language of 7 AAC 130.260(c) requires that additional hours "be justified as necessary,"[95] there is tension between the two regulations. The question arises as to who must "justify" the approval or denial of the additional hours above the regulation's "soft cap."

OAH decisions have varied on the answer to this question. The decisions in OAH Cases 18-0011-MDS and 18-0050-MDS assumed the burden of proof was on the recipient, accepting the Division's assertion that 42 C.F.R. § 431.220(b) required allocating the burden to the recipient because the change in hours was based on a change in law. However, the federal regulation and its equivalent Alaska Fair Hearing regulation, 7 AAC 100(3), merely provide that if there is an *automatic benefit adjustment* that applies to all recipients, the affected recipients are not entitled to a hearing to dispute the reduction or adjustment. Because the day habilitation regulation has only a "soft cap" that may be exceeded, and there is no "automatic benefit reduction," a recipient has the right to a hearing to challenge a reduction in hours. Thus neither 42 C.F.R. § 431.220(b) nor 7 AAC 100(3) addresses the burden of proof issue.

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

[92] 7 AAC 49.135.

[93] 7 AAC 130.260(c). Although the regulation as written requires a showing of both protection of health and safety and prevention of institutionalization, as noted above, the "and" language in 7 AAC 130.260(c)(2)(A) is currently read as "or" as part of a class action settlement.

[94] 7 AAC 49.135.

[95] 7 AAC 130.260(c).

The decision in OAH Case 18-1054-MDS took a different approach to the burden of proof issue. In that case, both sides were represented by counsel. The Division argued that the recipient had the burden of proof, while the recipient argued that the Division had the burden of proof. The decision allocated the burden of proof to the Division.

To reconcile the two regulations and to balance competing interests, the test articulated in OAH Cases 19-0014-MDS and 19-0066-MDS was developed. Under that analysis, resolving the question of who has the burden of proof in a 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 this and pointing out the regulatory soft cap of 12 hours per week.[96] In that circumstance, if the recipient nonetheless seeks to maintain an allocation above 12 hours, then the recipient would have to prove that previously unrecognized health, safety, or risk of institutionalization dictate a higher level of service. 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.[97]

There is no evidence in the record that S previously received 20 hours of day habilitation services due to a documented risk of institutionalization or health and safety concerns. As a result, S's family has the burden of proving by a preponderance of the evidence that the additional 8 hours of day habilitation over the 12-hour soft cap are justified as necessary to protect S's health and safety or to prevent institutionalization.

C. Protection of Health and Safety or Prevention of Institutionalization.

While the revised regulation limits the number of weekly day habilitation hours to 12 unless more is necessary to protect the recipient's health and safety or prevent institutionalization, the Medicaid regulations do not define or quantify the protection to health and safety, or risk of institutionalization associated with this exception. The standard to be applied here will be whether reduction of S's day habilitation hours to the twelve-hour cap would create actual threats to his health and safety or a risk of institutionalization during the plan year.

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[96] *See* 7 AAC 130.260(c).

[97] *See* 7 AAC 130.260(c).

1. Whether the additional 8 hours of day habilitation is necessary to prevent institutionalization

Mr. and Ms. D voiced concerns that without the same level of one-on-one support and supervision, S would be forced to live in an institutional setting instead of the degree of independence he is currently afforded.[98] Dr. Barnes similarly opined in a very conclusory fashion, that "any decrease in hours may lead [S] into increased threat of being institutionalized."[99]

The applicable regulations do not define risk of institutionalization or identify what type of placement constitutes an "institution."[100] The purpose of the Waiver program is to offer eligible recipients "opportunity to choose to receive home and community-based waiver services as an alternative to institutional care."[101] As a waiver recipient in the IDD category, S is eligible for Waiver services as an alternative to an intermediate care facility for individuals with intellectual disabilities (an ICF/IID).[102] It makes sense that the risk of institutionalization referred to in the regulation is the type of institutionalization that Waiver services are designed to replace. Accordingly, the question here is whether denying the 8 additional hours (over the 12-hour soft cap) of day habilitation services will put S at risk for placement in an intermediate care facility (or any other institutional facility of equivalent or greater restrictiveness) during the plan year.

To the extent that Mr. and Ms. D argue that reducing S's day habilitation hours will force him to live in an assisted living home or group home, risk of those types of placements is not enough to meet the exception to the 12-hour soft cap. Day habilitation services are only available to individuals who are in a residential setting, *i.e.,* a non-institutional setting. Residential settings include assisted living homes, group homes, and foster homes.[103] Accordingly, assisted living homes, group homes, and foster homes are not "institutions" for purposes of the day habilitation regulation.

There is no evidence that S needs skilled medical or psychiatric care that would require an intermediate care facility.[104] There is likewise no evidence that he has any serious behavioral or psychological issues that could place him in an institutional-type facility, such as an in-patient treatment center or a psychiatric hospital. Instead, the preponderance of the evidence shows that S needs

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[98] Y D Testimony; C D Testimony.

[99] Ex. 1.

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

[101] 7 AAC 130.200.

[102] 7 AAC 205(d)(3).

[103] 7 AAC 130.260(b); 7 AAC 130.265(b)(1) and (f).

[104] 7 AAC 140.510.

supervision, coaching, and unskilled assistance. And although he has significant special needs warranting waiver services, he has good natural supports, and his family ensures that his needs are met. His health has been stable over the past year. While he has some behavioral challenges when angry or frustrated, any problem behaviors are mild. If the family is unable to care for S, he would manage in an assisted living home or group home. As explained above, assisted living homes and group homes are not institutions in this context.

While the evidence shows that S requires supervision, coaching, and assistance, the evidence does not show that it is more likely true than not true that he faces institutionalization unless he receives more than 12 hours per week of day habilitation services.

2. Whether the additional 8 hours of day habilitation is necessary to protect S's health and safety

Mr. and Ms. D raised legitimate concerns about S's health and safety if he goes unsupervised. They argue that the family has already rearranged work schedules to ensure that S always has supervision, and that reducing S's day habilitation hours will either leave S unsupervised for significant amounts of time or require institutionalization to ensure that he has constant supervision. They point to specific instances when lack of supervision resulted or could have resulted in substantial safety risks. They argue that S would be unsafe both at home and out in the community without one-on-one support. But there is no dispute that S requires close supervision. As the Division's witness Thea Howard testified, every recipient of IDD services has qualified for Waiver services in the first place because of a need for one-on-one support and risks to their health and safety. Indeed, assisting recipients with acquiring, retaining, or improving their self-help, socialization, behavior, and adaptive skills is the very purpose of day habilitation services.[105] So, the appropriate standard is whether more than 12 hours per week of *day habilitation* services are necessary to protect S's health and safety during the plan year. There must be actual threats to S's health and safety that make the 8 additional day habilitation hours per week necessary.

The undisputed evidence shows that S struggles with distractibility, impulsivity, money management, social interaction, and completion of multiple-step tasks.[106] He lacks judgment and is unable to comprehend or appreciate safety issues.[107] S undoubtedly needs supervision and one-on-one support that historically, has been provided, at least in part, through day habilitation services. Day

[105] 7 AAC 130.260(b).
[106] Ex. E at 15, 44-47.
[107] Ex. E at 12.

habilitation services are beneficial to S to promote physical activity, socialization, and life skills.[108] S's day habilitation services provide S with "the opportunity for learning skills important for greater independence in all areas of community living including but not limited to: shopping, money management, personal awareness, and socialization skills." [109] However, the regulation requires that providing day habilitation hours in excess of the 12 hours per week cap must be "justified as necessary . . . to protect the recipient's health and safety [or] . . .to prevent institutionalization."[110]

As noted, S's family bears the burden of proof in this case, and there must be an actual risk to health and safety if the hours above the 12-hour per week regulatory cap are not approved. Here, the evidence shows that day habilitation services are appropriate for S, and thus, S has been approved for the regulatory soft cap of 12 hours per week. Just as those services are intended, they are assisting S with acquiring, retaining, or improving his self-help and socialization; they are reinforcing skills taught in other settings; and they are promoting the skills necessary for independence, autonomy, and community integration.[111] The weight of the evidence does not, however, show that it is more likely true than not true that S's health and safety are at risk without more than 12 hours per week of *day habilitation* services. Although S will likely need some kind of other services to supplant the 8-hour reduction in overall service hours, that is outside the scope of this case.

IV. Conclusion

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 more hours are necessary to protect the recipient's health and safety or prevent institutionalization. While the evidence in this case shows that S requires consistent supervision and he benefits from day habilitation services, the evidence does not show that he faces institutionalization or a risk to his health and safety if his day habilitation hours above the regulatory maximum are not approved. Accordingly, the Division's denial is AFFIRMED.

Dated: May 15, 2019

Signed
Kathryn Swiderski
Administrative Law Judge

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[108] Ex. 1; Ex. E at 48.
[109] Ex. E at 27.
[110] 7 AAC 130.260(c)(2).
[111] 7 AAC 130.260(b).

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 23rd day of May, 2019.

By: *Signed*
Name: Cheryl Mandala
Title: Administrative Law Judge

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