

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

In the Matter of)
)
E P) OAH No. 19-0284-MDS
) Agency No.
_____)

DECISION

I. Introduction

E P receives day habilitation services as part of her Medicaid Waiver plan of care. In October 2017, the Division of Senior and Disability Services (“Division” or “SDS”) bF implementing new IDD Waiver regulations, including a new regulation that limited a recipient’s day habilitation hours to no more than twelve hours per week, or 624 hours a year, unless additional hours are necessary to “protect the recipient’s health and safety” or to “prevent institutionalization.”¹ Citing the new regulations, the Division reduced E’s day habilitation services in her 2018-2019 Plan of Care (POC) to the new “cap,” claiming she had not demonstrated that the additional hours of day habilitation services she had requested were necessary. Subsequently, there was a settlement agreement which resulted in E receiving her 2017-2018 POC weekly average of day habilitation services – *i.e.*, 28.6 hours per week on the average for the remainder of her 2018-2019 POC year.

When E submitted her 2019-2020 POC, she requested 29.1 hours per week of day habilitation services, which represented an increase of .5 weekly hours over the day habilitation services she had been receiving under the settlement agreement. After reviewing her 2019-2020 POC, the Division only approved 12 hours of day habilitation services, finding that the remaining day habilitation services requested were not necessary to protect E’s health and safety or to prevent institutionalization. E’s guardian appealed the Division’s determination.

The evidence, consisting of hearing testimony and the documents submitted as part of the record, show that E’s mental health, communication, and decision-making skills would decline if her day habilitation hours are reduced to 12 hours per week. Because a reduction in E’s day habilitation services threatens her health and safety, the Division’s decision to reduce E’s day habilitation hours to 12 hours per week is REVERSED. Accordingly, the Division is directed to continue to provide E with 28.6 hours of day habilitation services a week. However, E has not demonstrated that an additional .5 hours

¹ 7 AAC 130.260(c). Although the regulation says “and” not “or,” the regulation is currently read as saying “or” following the settlement of a class action lawsuit regarding this regulation.

of day habilitation services weekly is needed to protect her health and safety. Accordingly, her request for day habilitation services in excess of 28.6 hours per week is DENIED.

II. Facts

E P is a twenty-three-year-old female with Down syndrome.² She lives with her parents, 21-year-old twin sisters, and two dogs.³ She completed her schooling in May of 2018. E enjoys being active in the community but requires considerable support to do so. During the past year her day habilitation activities have included volunteering at No Name Elementary school, at the local ASPCA, and being active in the Special Olympics program both as an athlete and as a coach.⁴ Her participation in the Special Olympics program has been praised by O F, the President and CEO of Special Olympics Alaska, who views E as an individual with the potential to be a leader, an advocate, and meaningfully employed citizen if she continues to receive the direct skilled support she has received in the past through the day habilitation program.⁵

E's hearing has been affected by reoccurring ear infections which has affected her ability to communicate with others.⁶ She has difficulty speaking up, struggles with basic communication skills, is unable to be left alone for any amount of time, and is unable to take care of herself without assistance.⁷ She also is a vulnerable adult who is trusting and unable to advocate for herself.⁸ This has led to her being assaulted in the past by predators; consequently, she is unable to be out in the community without assistance.⁹ Accordingly, a strong focus of E's requested day habilitation services is increasing her social and communication skills, her safety skills when she is in the community, and strengthening her coping skills.¹⁰

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² Exh. E, pp. 3-4.

³ Exh. E, p. 8.

⁴ Exh. E, pp. 8, 10-11 & 20.

⁵ Exh. 1, p. 2 (further stating that "I implore you to give E the additional direct service support she needs" as she "could be a leader in Alaska" and "deserves the opportunity to excel like her peers without intellectual disabilities in the work place, community, and personal life").

⁶ Exh. E, pp. 4 & 11.

⁷ Exh. E, pp. 12-13 & 19.

⁸ Exh. E, pp. 19-20.

⁹ Exh. E, pp. 12, 13, 19; *see also* Testimony of Ms. P. There were two such incidents in the past. In one case, E was assaulted by a trusted adult and eloped and was gone for an extended period, far from where she originated, and was unable to talk about what happened when she was found. In another incident, a young male fondled her breast and E just stood there until a caregiver intervened. *See* Exh. E, pp. 12 & 19-20.

¹⁰ *See* Exh. E, pp. 20-25. Other skills listed in the 2019-2020 POC were for E to improve her personal hygiene, personal and community tidiness, and to assist her in using her learned skills to promote positive organization and leadership.

A. E's IDD Plans of Care

E receives waiver services through the IDD program. Her services include supported living, hourly and daily respite, and individual and group day habilitation.¹¹ It is only the amount of E's day habilitation services that are in dispute.¹²

1. E's 2017-2018 POC

E's 2017-2018 POC was approved for approximately 28.3 hours of day habilitation services a week.¹³ The focus of E's day habilitation services during the 2017-2018 POC year, as described in her goals, was to gain independence in activities of daily living, increase her comfort with communication and increase her self-confidence, communicate directly with staff and community members, maintain personal boundaries with others in the community, increase her activity in the community, maintain personal and community tidiness, and learn how to use her cell phone as a tool for organization.¹⁴

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.¹⁵

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:

¹¹ Exh. A, p.2; Exh. D, p. 1.

¹² Exh. D, p.1; Exh. C, pp. 3-4.

¹³ See Exh. G, pp. 1 & 4. E was approved for 1,232 units of individual day habilitation services and 4,673 units of group day habilitation services for a total of 5,905 15-minute units for the POC year. This translates into approximately 28.389 hours of day habilitation services each week. See Exh. G, p. 9.

¹⁴ See Exh. G, pp. 19-26. Each goal contains objectives the recipient will use to achieve that goal. See *id.*

¹⁵ Exh. B, p. 17.

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.¹⁶

B. E's 2018-2019 Plan of Care

E's 2018-2019 POC covered the period from January 13, 2018 to January 12, 2019. In this POC, E sought to have 28.6 hours of day habilitation services approved.¹⁷ Her day habilitation goals were to increase her comfort with communication and increase her self-confidence, communicate directly with her staff and peers, maintain personal and community tidiness, and use learned skills to promote positive organization and leadership.¹⁸ The Division reviewed the POC, but only approved 6 hours of individual day habilitation and 6 hours of group day habilitation under the 2018-2019 POC, citing to the new regulation.¹⁹ Due to a procedural error in the regulation and a subsequent lawsuit, all individuals who had their day habilitation hours reduced in their 2018-2019 POCs, were given the option to return to the levels of service they had received in their 2017-2018 POC.²⁰ Consequently, effective July 6, 2018, E bF receiving, on the average, six hours of individual day habilitation and approximately 22.6 hours of group day habilitation per week for the remainder of the 2018-2019 POC year, or a total of 28.6 day habilitation hours a week.²¹ This was slightly higher than the number of hours – *i.e.*, 28.3 hours a week -- she had received under the 2017-2018 POC.²²

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¹⁶ 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>.

¹⁷ See Exh. F, p. 1. Specifically, E requested 1,992 15-minute units of individual day habilitation and 2,496 15-minutes of group day habilitation during the POC year. Her request translated into approximately 9.6 weekly hours of individual day habilitation and 12 weekly hours of group day habilitation. See Exh. F, pp. 1 & 5.

¹⁸ Exh. F, pp. 22-25.

¹⁹ See Exh. F, p. 1.

²⁰ Testimony of Ms. Allen.

²¹ Under the terms of the settlement agreement, E received 5 hours of individual day habilitation for 18 weeks and 8 hours of individual day habilitation for 9 weeks, which totaled 648 15-minute units over the 27-week period or 6 hours on the average per week. The settlement agreement also authorized E to receive 20 hours of group habilitation for 18 weeks and 28 hours for 9 weeks, which totaled 2,448 units over the 27-week period – *i.e.*, 22.6 hours per week. In the aggregate, E received 28.6 hours per week of day habilitation services as a result of the settlement agreement.

²² Compare Exh. G, pp. 1-2 with Exh. G, p. 4.

C. E's 2019-2020 POC

E submitted her 2019-2020 POC on February 28, 2019, although the start date for the POC was January 13, 2019.²³ E's goals under this POC were to: increase her social skills, to increase her safety skills while in the community, increase her personal hygiene, maintain personal and community tidiness, use her learned skills to promote positive organization and leadership, and strengthen her coping skills.²⁴ To achieve these goals and objectives, the POC requested 11.8 hours per week of individual day habilitation and 17.3 hours per week of group day habilitation skills for a total of 29.1 hours of day habilitation a week.²⁵ This request represented a slight increase over the 28.6 hours per week E was authorized to receive during the last 27 weeks of the prior year's POC.²⁶

E's day habilitation activities include participating in Special Olympics as a mentor/fitness coach and volunteering at a local elementary school and the local SPCA. She also continues to participate in the No Name After School Program.²⁷

D. The Division's Review and Partial Denial

On March 27, 2019, the Division notified E's parents that her day habilitation services for the 2019-2020 POC year would be reduced to 12 hours a week, and that her request for 14.6 additional hours of day habilitation weekly was denied.²⁸ The denial letter, authored by Kathryn Brooke Allen, cited the changed regulation for day habilitation services and provided a link to all the Medicaid waiver regulations.²⁹ While the letter acknowledged the benefits of day habilitation services for E, the Division concluded that the approved level of service met E's needs:

Although it is apparent that E benefits from Day Habilitation services and requires supports when she is in the community; her care needs, in regard to health and safety, do not rise to the level of

²³ Exh. D, p. 1.

²⁴ Exh. E, pp. 20-25.

²⁵ See Exh. E, p. 2; Ex. D, p.1. Specifically, E's 2019-2020 POC requested 2,460 units of individual day habilitation and 3,604 units of group day habilitation, or a total of 6,064 units for the 2019-2020 POC year. See *id.*

²⁶ Compare Exh. G, p. 1 with Exh. E, p. 2 E is requesting 29.1 hours of day habilitation hours under the 2019-2020 POC; she was receiving 28.6 hours during the final 27 weeks of the prior POC.

²⁷ Exh. E, p. 20.

²⁸ Exh. D, p. 1.

²⁹ Exh. D, pp. 1-2. At the hearing, Ms. Allen testified that she had consulted with her supervisor in connection with her determination that E should only receive 12 hours per week of day habilitation services. See Testimony of Ms. Allen.

severity which might be considered for a limited number of hours beyond the regulatory limit.³⁰

The denial further noted that additional day habilitation hours are not justified “as necessary to prevent institutionalization” within the POC year.³¹

D. Appeal

B C, E’s care coordinator, requested a fair hearing to challenge the reduction in E’s day habilitation benefits.³² The hearing for that appeal was held on May 20, 2019. Terre Gagne represented the Division. Brooke Allen, a Health Program Manager II at SDS who reviewed E’s 2019-2020 POC and made the decision to reduce her weekly day habilitation hours to 12 hours a week, testified for the Division. E P, E’s mother and guardian, represented her and testified on her behalf. B C, E’s Care Coordinator, and C C, whose agency provides services to E, also testified on E’s behalf.³³ All exhibits were admitted without objection.

1. The Division’s Position

In presenting the Division’s case, Ms. Gagne argued that the new regulation capped day habilitation services to twelve hours per week unless additional hours were justified as necessary to protect the recipient’s health and safety or to prevent institutionalization.³⁴ She then asked Kathryn Brooke Allen to explain why she had concluded that E’s day habilitation hours should be reduced to 624 hours a year, or 12 hours per week.³⁵

When she reviewed E’s 2019-2020 POC, Ms. Allen testified that she also examined E’s prior POCs, and any history showing that E’s health and safety was at risk or that she was at risk of institutionalization. She also looked at E’s assessments and diagnoses, and the services E has used in the past. In doing this review, Ms. Allen sought to determine whether the additional day habilitation

³⁰ Exh. D, p. 2.

³¹ Exh. D, p. 2.

³² Exh. C, p. 3. Ms. C is employed by Business A. See Ex. C, pp. 3-4.

³³ Ms. C introduced herself at the hearing as the case manager at No Name; this agency provides day habilitation and supported living services to E. See Exh. C, pp. 3-4; Exh. E, pp. 19 & 25.

³⁴ Presentation of Ms. Gagne.

³⁵ Presentation of Ms. Gagne; Testimony of Ms. Allen. Ms. Allen testified that she holds an undergraduate degree in psychology and a master’s degree in special education with an emphasis in behavior disorders. She has over forty years in the disability field. See Testimony of Ms. Allen.

hours above 12 hours per week were necessary to protect E’s health and safety “and if those hours above that limit “are *critical* for that.”³⁶

Ms. Allen testified that E’s health had greatly improved and that there were no emergency room visits, hospitalizations, or crucial incident reports mentioned in the 2019-2020 POC.³⁷ She also noted that there were no “critical behaviors,” such as aggression or extreme outbursts, and no “critical incident” reports listed in the POC.³⁸ For these reasons, Ms. Allen concluded that E had no particular health and safety needs indicating she would need more than 12 hours of day habilitation a week to practice safety skills or to manage a health issue.³⁹ Furthermore, Ms. Allen saw nothing suggesting that E was a risk of institutionalization, as there was no history of placements in residential psychiatric centers or immediate care facilities.⁴⁰

According to Ms. Allen, day habilitation attempts “to minimize risks to individuals by teaching safety skills that they might need in the community and by providing the supervision they need during those habilitative activities.” However, she felt that 12 hours per week of day habilitation was a “good amount of time to practice the skills [E] needed for her self-advocacy and other social skills.”⁴¹ Ms. Allen testified that E had received more day habilitation hours in the past because she was active in various activities and was addressing various skills through those activities. Although Ms. Allen felt that Darcy had benefitted from these additional hours, the hours above the 12-hour cap “may not have been *absolutely* necessary” for E’s health and safety.⁴²

On cross-examination, Ms. Allen was asked whether E might regress if her day habilitation hours were reduced. Ms. Allen stated that in order to answer this question, she would need data in the form of performance and behavior data from before and after “regulatory change” in order to assess that risk. However, Ms. Allen admitted that there probably wouldn’t be such data available until E’s hours were reduced under the 2019-2020 POC and acknowledged that it was a bit of a “catch 22” situation.⁴³ Ms. Allen also confirmed that she looked at data in the 2019-2020 POC which showed E’s progress, but

³⁶ Testimony of Ms. Allen (emphasis added). Upon further questioning, Ms. Allen acknowledged that the regulations did not contain a “critical” requirement and that this was her own language. *See* Testimony of Ms. Allen.

³⁷ Testimony of Ms. Allen; *see also* Exh. E, p. 4.

³⁸ Testimony of Ms. Allen; *see also* Exh. E, pp. 12-13.

³⁹ Testimony of Ms. Allen.

⁴⁰ Testimony of Ms. Allen.

⁴¹ Testimony of Ms. Allen.

⁴² Testimony of Ms. Allen (emphasis added).

⁴³ Testimony of Ms. Allen.

admitted that “we actually don’t know” whether hours above the 12-hour cap are necessary for that type of progress to continue.”⁴⁴

Ms. Allen explained that the Division defines “health and safety” in context of the day habilitation regulation as health issues which “could only be addressed with those additional [day habilitation] hours.” The health issue must be “so severe” or so “directly related” to the day habilitation services that it is necessary to maintain that person’s health.⁴⁵ Diabetes and obesity health issues, in which exercise provided in a facility outside the home might be absolutely necessary or even doctor-ordered, was one such example Ms. Allen provided.⁴⁶ Another was when a person’s activity level is “so severe” that it is causing “extreme behavioral disruption in the home, extreme property destruction, extreme risk of injury to self and others” if the recipient is not out and about working on their objectives.⁴⁷ With regard to safety issues, Ms. Allen explained that if a person has an activity level so high that the behavior expression becomes severe, there would be safety issues for the individual or others around the individual.⁴⁸ Given E’s history as a victim of predators, Ms. Allen acknowledged that the prior incidents of molestation and elopement were a “safety concern.” However, she said that she didn’t know whether additional day habilitation hours would reduce that risk.⁴⁹

Ms. Allen concluded her testimony by stating that E had a lot going for her and a “bright future.” She felt that fewer day habilitation hours “might be a good thing” as far as being a transition for E and allowing her to figure out what other directions she might go. Ms. Allen also stated that the Division’s decision might “open up some doors” for E since day habilitation services might not meet her needs.⁵⁰

2. *E’s Position*

Ms. P presented E’s position. She stated that E is not safe to be by herself and observed that Webster’s Dictionary defines “safety” as a condition of being protected from danger and the risk of injury.⁵¹ She explained that day habilitation is what addresses E’s mental and behavioral health.⁵² In describing her daughter, Ms. P said that E is social and needs to be out in the community. However, E

⁴⁴ Testimony of Ms. Allen.

⁴⁵ Testimony of Ms. Allen.

⁴⁶ Later in her testimony, Ms. Allen noted that mental health was also a health issue. *See* Testimony of Ms. Allen.

⁴⁷ Testimony of Ms. Allen.

⁴⁸ Testimony of Ms. Allen.

⁴⁹ Testimony of Ms. Allen.

⁵⁰ Testimony of Ms. Allen.

⁵¹ Testimony of Ms. P.

⁵² Testimony of Ms. P.

cannot access community activities without supervision.⁵³ Ms. P also pointed out that depression is a risk factor with individuals who have Down syndrome and are socially isolated.⁵⁴

Ms. P noted that E has been succeeding at her current level of day habilitation hours. Ms. P also pointed out that day habilitation services are the support which allows E to take part in activities like volunteering at the SPCA and participating in the Special Olympics.⁵⁵ During her testimony, Ms. P expressed her concern that it is more likely than not going to cause harm to E's mental health if her day habilitation hours are reduced because she will be isolated in the home.⁵⁶ Ms. P further argued that the other services the Division offers – in-home support and respite – are not appropriate for E. Respite is not goal-oriented and cannot be used when E's parents are working. Moreover, although in-home support can work on some of E's goals, it is a duplication of services the family is providing and further isolates E from the community.⁵⁷ Ms. P stated that she also is pursuing other resources for E, such as ARC and DVR for E. However, in her view, it is likely that E might regress if her day habilitation hours are reduced when E has nothing to take their place.⁵⁸

According to Ms. P, when E's day habilitation hours were reduced to twelve hours a week under the 2018-2019 POC, this reduction in day habilitation hours affected E's behavior.⁵⁹ She was unable to make simple choices, would withdraw in her group day habilitation setting, and there was an increase in her obsessive behaviors.⁶⁰ When the Division recently denied the additional hours requested in her 2019-2020 POC, E returned to only receiving six hours of individual day habilitation and six hours group day habilitation per week.⁶¹ Ms. P testified that E's problematic behaviors have emerged again with the most recent reduction in her day habilitation hours: E is engaging in obsessive compulsive behaviors, is self-stimulating by tying a ribbon on a pen and wiggling it, and is retreating to her room to watch videos on her phone.⁶²

Next, B C, who recently became E's care coordinator, testified on E's behalf. She observed that it was "still very murky" what specifically qualifies as a health and safety concern."⁶³ E, she noted, does

⁵³ Testimony of Ms. P; *see also* Exh. E, pp. 13, 19-20.

⁵⁴ Testimony of Ms. P.

⁵⁵ Testimony of Ms. P.

⁵⁶ Testimony of Ms. P.

⁵⁷ Testimony of Ms. P.

⁵⁸ Testimony of Ms. P.

⁵⁹ Testimony of Ms. P; *see also* Exh. G, pp. 1-2.

⁶⁰ Testimony of Ms. P.

⁶¹ *See* Testimony of Ms. P.

⁶² Testimony of Ms. P.

⁶³ Testimony of Ms. C.

not display behaviors harming others or property. Instead, she displays passive, introverted behaviors which cause destruction to herself.⁶⁴ Ms. C pointed out that the 2019-2020 POC describes various emotional health concerns for E: when E feels frustrated, she retreats into herself and sits alone in a corner, exhibits obsessive behavior, and becomes depressed.⁶⁵ Ms. Bigham also argued that E needs self-advocacy and communication skills so she can stop a predator or report inappropriate behavior to a staff person. However, when E loses her additional day habilitation hours, she also loses her communication skills.⁶⁶

Finally, Ms. C testified on E's behalf. She stated that she has spent a lot of time with E over the past few years and that the current level of support works for E. Ms. C noted that during the prior POC (2018-2019), E's behavior was affected when her day habilitation hours were reduced from January 13, 2018 to July 5, 2018. Some of the biggest changes Ms. C observed when E was receiving only 12 hours per week of day habilitation services under the 2018-2019 POC were: (1) her obsessive behaviors became extreme; (2) her decision-making and communication skills quickly decreased; and (3) she began to self-isolate and forgot to eat or feed herself.⁶⁷

Ms. C testified that E needs constant supports in order to maintain and retain skills she has learned and that E needs support in connection with her volunteer activities. She also noted that after E's requested day habilitation hours were reinstated under the 2018-2019 POC, she was set up with two volunteer activities at No Name Elementary and at the SPCA. When her day habilitation hours were increased, E's mood improved, her self-isolating behaviors decreased, she was more active in the community, and there was less of an issue with self-neglect.⁶⁸

Ms. C testified that she has begun seeing similar problematic behaviors in E now that the Division has again reduced her day habilitation hours under the 2019-2020 POC. She has noticed that E is self-isolating, has no energy to go for a walk, must be reminded to drink water and eat snacks, and has become more upset and cries on a regular basis.⁶⁹ Ms. C also pointed out that E is a visibly vulnerable individual and that makes her a target to some people. Consequently, without additional hours of day

⁶⁴ Testimony of Ms. C.

⁶⁵ Testimony of Ms. C; *see also* Exh. E, pp. 12-13 & 20.

⁶⁶ Testimony of Ms. C; *see also* Exh. E, pp. 20.

⁶⁷ Testimony of Ms. C. For example, E became obsessed with a male supervisor, wrote him songs, and everything she thought, talked about, and researched was related to him. One example her of self-isolation was the change in E's behavior when she was in a group of her peers that she has known for years. She began to withdraw and would try to leave the room or would find a corner and then would put a hoodie over her head or cover herself up with a blanket. *See* Testimony of Ms. C.

⁶⁸ Testimony of Ms. C.

⁶⁹ Testimony of Ms. C.

habilitation to learn self-advocacy skills, Ms. C “definitely” feels that E’s safety could be affected and points to the two past predatory incidents.⁷⁰

Ms. C views that the current cut in hours under the 2019-2020 POC to be more problematic than when E’s day habilitation hours were reduced during the first half of her 2018-2019 POC year. This is because E was still in school in 2018, so that only her after-school day habilitation hours were affected.⁷¹

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.”⁷² The Division must approve each specific service as part of the Waiver recipient’s POC.⁷³

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.⁷⁴

The regulation applicable to day habilitation services was amended in October 2017.⁷⁵ 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.”⁷⁶ 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.⁷⁷ Accordingly, the Division’s determination to reduce E’s day habilitation services to 12 hours per

⁷⁰ Testimony of Ms. C. Although these incidents occurred several years ago, Ms. C said they were put in the current plan to show that E is at risk if she does not have appropriate support when she is in the community. *See* Testimony of Ms. C.

⁷¹ Testimony of Ms. C.

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

⁷³ 7 AAC 130.217(b); *see also* Exh. B, p. 6.

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

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

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

⁷⁷ 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>.

week and E's request for .5 additional hours of day habilitation services over the prior POC year must be evaluated under this standard.

B. Burden of Proof

1. The First Prong

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.⁷⁸ However, this case involves a change to the regulation controlling the provision of day habilitation services, which now requires hours in excess of 624 hours per year (an average of 12 hours per week) be justified by health, safety, or institutionalization concerns.⁷⁹ 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.⁸⁰ 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.⁸¹

A review of E's prior POC (2018-2019) reveals four goals: (1) to increase E's comfort with communication and increase her self-confidence; (2) to communicate directly with her staff and peers; (3) to maintain personal and community tidiness; and (4) to use learned skills to promote positive organization and leadership.⁸² Thus, there are goals in her prior POC which are directly related to emotional/mental health and safety concerns.⁸³ Although the Division's witness testified that the additional hours above the "cap" may not have been "*absolutely necessary*" for E's health and safety in

⁷⁸ 7 AAC 49.135.

⁷⁹ See 7 AAC 130.260(c).

⁸⁰ See 7 AAC 130.260(c).

⁸¹ See 7 AAC 130.260(c).

⁸² See Exh. F, pp. 22-25.

⁸³ For example, one of the objectives under these goals was to promote decision-making in E and to have her recognize when something or somebody in the community was making her uncomfortable. Another objective was for E to ask direct questions and provide direct responses to staff and peers. See Exh. F, pp. 22-23.

2018-2019 POC year, the standard in the regulation is lower: it only requires that the hours be *necessary* for E’s health and safety.⁸⁴ As a result, the Division has the burden of proof to demonstrate that reducing E’s day habilitation hours from the 28.6 hours she received under the prior POC (2018-2019) will not place her health and safety at risk or put her at risk of institutionalization.

2. *The Second Prong*

E, however, bears the burden of showing by a preponderance of the evidence that she should receive a .5 hour per week increase in her day habilitation hours over the 28.6 hours per week she received under the 2018-2019 POC (as amended by the settlement agreement).⁸⁵ To meet this burden of proof, E must show that the requested .5 hour per week increase in her weekly day habilitation hours is necessary to protect her health and safety or to prevent institutionalization.

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.⁸⁶ Thus, the question is whether reducing E’s hours to the “cap” will result in a risk to her health and safety. The answer to that question is yes.

The evidence, in summary, establishes that:

- E requires assistance to engage with the community;⁸⁷
 - When her access to the community is reduced, E’s mental and emotional health declines;⁸⁸
- and

⁸⁴ E’s witnesses testified the E’s emotional and mental health deteriorated when her day habilitation hours under the prior POC were reduced to 12 hours per week. However, when E’s day habilitation hours were increased to an average of 28.6 per week, E’s mood improved, her self-isolating behaviors declined, and there was less of an issue with self-neglect. *See* Testimony of Ms. P; Testimony of Ms. C.

⁸⁵ 7 AAC 49.135(stating that for additional benefits, the burden of proof is on the recipient requesting the services).

⁸⁶ The Division’s assertion that the reduced day habilitation hours would not pose a risk of institutionalization for E was not disputed by E’s mother or her witnesses. *Cf.* Testimony of Ms. Allen *with* Testimony of Ms. P, Testimony of Ms. C; Testimony of Ms. C.

⁸⁷ Testimony of Ms. P;

⁸⁸ Testimony of Ms. P; Testimony of Ms. C.

- When E’s access to the community is reduced, her decision-making and communication skills decline, thereby threatening her safety.⁸⁹

The evidence shows that E has significant impairments with communication skills and social interactions. She does not self-advocate for herself, has difficulty communicating with others, has been the victim of predators, self-neglects, and requires supervision to access community activities. Because of this, E’s day habilitation services have largely focused on increasing E’s social skills and safety skills while in the community. The testimony of E’s witnesses is unequivocal: E’s emotional and mental health declines when she only receives 12 hours a week of day habilitation services.⁹⁰ She also loses her communication and decision-making skills, which are critical to her safety as a vulnerable adult.⁹¹

The Division has the burden of proof. It has not shown that reducing E’s hours to the cap will not result in a risk to her health and safety.⁹² Essentially, the Division is simply saying that E is doing well and that she will continue to do well if her hours are reduced.⁹³ 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 her health and safety.

D. How Many Hours Per Week of Day Habilitation Services Should E receive?

The 2019-2020 POC contains seven goals for E and majority of those goals are related to E’s health and safety. While it can be argued that two of the goals – *i.e.*, maintaining personal and community tidiness and using learned skills to promote positive organization and leadership – are not related to E’s health and safety, these goals appear to only encompass a limited amount of time well within the 12-hour limit allowable for goals that *are not* necessary for a recipient’s health and safety. Accordingly, because the Division has not met its burden of proof, E should continue receiving 28.6 hours per week of day habilitation services – *i.e.*, the same number of hours she received under her prior POC (2018-2019).

However, E bears the burden of proving that she should receive .5 hours of additional day habilitation hours over her prior allocation under the 2018-2019 POC (as amended by the settlement

⁸⁹ Testimony of Ms. C.

⁹⁰ See Testimony of Ms. C; Testimony of Ms. P.

⁹¹ Testimony of Ms. C.

⁹² Compare Testimony of Ms. Allen (admitting that she really does not know whether E might regress if her hours were reduced to the 12-hour cap) with Testimony of Ms. C (describing how E’s mental and emotional health declined when the Division reduced her day habilitation hours to 12 hours per week).

⁹³ See *supra*, pages 7-8 & notes 44, 49 (summarizing Ms. Allen’s testimony).

agreement). However, she has presented no evidence justifying why she should receive .5 additional day habilitation hours in addition to the 28.6 hours per week of day habilitation services that she received, on the average, under the 2018-2019 POC.

IV. Conclusion

The Division sought to reduce E's day habilitation services to an average of 12 hours per week while E sought to increase her day habilitation services by .5 hours per week.

Because E's witnesses established that her prior POC, as of July 6, 2018, demonstrated a need for hours in excess of 12 per week due to health and safety concerns, the Division had the burden of proof with regard to reducing E's services to the "cap". The Division did not meet its burden. Instead the evidence shows a continued need for day habilitation services in excess of the "cap."

E, however, bears the burden of proof for showing that she needs an additional .5 hours per week of day habilitation services beyond what she was receiving under the amended 2018-2019 POC. She did not meet that burden.

Accordingly, the Division is to continue to provide E with 28.6 hours per week of day habilitation services for her 2019-2020 POC year.

Dated: July 12, 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 24th day of July, 2019.

By: Signed
Signature
Kathleen A. Frederick
Name
Administrative Law Judge
Title

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