

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

In the Matter of)
)
S.X.) OAH No. 19-1138-MDS
) Agency No. 19-SDS-0432
_____)

DECISION

I. Introduction

S.X.¹ is a disabled adult who receives a variety of Medicaid Waiver services. He requested an amendment to his Medicaid Waiver Plan of Care (POC) which increased his individual day habilitation services to a total of 53 hours per week for the one week when he was going to be vacationing. The proposed change was to be accomplished, not by an increase in his yearly overall services, but instead by reallocating those services: first by converting his group day habilitation hours (6 hours) and supported employment hours (12 hours) to individual day habilitation services for the vacation week, and secondly by decreasing his group day habilitation hours during the remainder of the year by a total of 26 hours and adding those 26 hours to his individual day habilitation hours during that week.

The Division of Senior and Disabilities Services (Division) partially approved S's request on November 8, 2019. It converted his group day habilitation hours (6) and his supported employment hours (12 hours) during the vacation week and increased S's day habilitation hours by those 18 hours, which resulted in S being approved for a total of 27 hours of individual day habilitation services during that week.² The transfer of 26 group day habilitation hours from other weeks was denied. A hearing was requested to challenge the partial denial of the amendment request.

S's hearing was held on February 6, 2020. S.; his father; Shawn Bass, the administrator at [abc] – S's service provider; Russell Field, Todd's direct service provider at [abc]; Stacey Messerschmidt, S's Medicaid Care Coordinator; and Christine Culliton, also with Todd's Care Coordination agency, all attended in person. Ms. Messerschmidt and Ms. Culliton assisted with S's representation. Mr. Bass and Ms. Messerschmidt testified on S's behalf. The Division was represented by Victoria Cobo-George. Brooke Allen, a Health Program Manager II with the

¹ S's father, F.X. , is his guardian. In order to differentiate between the two, F.X. will be referred to as Mr.X while S.X. will be referred to as S.

² S's POC already was approved for 9 hours per week of individual day habilitation services.

Division's Intellectual and Developmental Disability Unit, testified on the Division's behalf. Ms. Cobo-George and Ms. Allen participated telephonically.

The evidence shows that S's amendment request to transfer, in pertinent part, a total 26 hours of group day habilitation from the remainder of the plan year, to individual day habilitation during the vacation week was an appropriate request, supported by documentation provided with the application, did not result in an increase in overall service hours during the plan year, and should have been granted. Accordingly, the denial of that request is reversed.

II. Facts

S. is a 43-year-old intellectually disabled man with very limited communication skills. He is autistic and has an impulse control disorder. He is not physically disabled.³ S. does not reside with F.X., his father, but F.X. provides frequent unpaid support for him. S. was present during his hearing and it was possible to observe him during the hearing. He frequently verbalized during the hearing, generally one word "Raven" or "Kake" and displayed signs of minor agitation. F.X. sat next to S. calming and reassuring him throughout the entire hearing.

S. receives Medicaid Waiver services under the Medicaid Intellectual and Developmental Disabilities (IDD) Medicaid Waiver category. He applied and was approved for a variety of Medicaid Waiver services as part of his 2019 – 2020 POC. Those services were for an average of 58 hours per week, 52 weeks per year, of Supported Living (12,064 units), an average of 9 hours per week, 52 weeks per year, of individual Day Habilitation (1,872 units), and an average of 6 hours per week, 52 weeks per year, of group Day Habilitation (1,248 units), and an average of 12 hours per week, 52 weeks per year, of individual Supported Employment (2,496 units).⁴

After S's 2019 – 2020 POC was approved, an opportunity arose for S. to take a one-week vacation in Hawaii in conjunction with a local non-profit that offers recreational opportunities to disabled persons. S. expressed a desire to go on that trip. F.X. has health issues that made it not possible for him to join S. on that trip and to help provide support for S. As a result, S's care team requested an amendment to his POC that would provide him with services during that one-week trip.⁵

³ Ex. F, pp. 5, 8.

⁴ Ex. F.

⁵ Ms. Messerschmidt's testimony.

S's care team first requested that S's supported living time be reallocated to day habilitation hours during the trip. The Division's reviewers determined that change would be inappropriate because supported living services and day habilitation services have different purposes.⁶ S's care team then submitted a revised amendment request on November 5, 2019. That amendment request did not request an increased in overall services, but instead proposed that S's individual day habilitation hours (9 hours) be increased by 44 hours to a total of 53 hours for the Hawaii trip only. S's care team proposed that the 44 hour increase in individual day habilitation hours be accomplished by converting his supported employment services for the week, 12 hours, to day habilitation hours. It further proposed that S's group day habilitation hours, 6 hours, be converted to individual day habilitation hours for that week. This comes to a total of 18 hours increase in individual day habilitation. The team proposed that the additional 26 hours comes from decreasing his group day habilitation hours (6 hours per week) by approximately 3 hours per week for 8 weeks.⁷ S's amendment request was accompanied by trip schedules that showed, including the transit times, that he would be in community settings approximately 74 hours during the Hawaii week.⁸ The 8 week reduction in group day habilitation was to be offset, not by increasing other services, but rather by F.X. t spending additional time with S: "S's Dad will provide natural supports to make up for the gap in service coverage, ensuring S's health, safety and welfare."⁹

The Division approved the request to transfer the time allotted for supported employment (12 hours) and group day habilitation (6 hours) for that week over to individual day habilitation. This was an increase of 18 hours to the allotted individual day habilitation (9 hours) for that week. This resulted in S. being approved for a total of 27 hours of individual day habilitation for the week. The Division, however, denied the request to transfer 26 hours of group day habilitation, by reducing the amount available during other weeks, to individual day habilitation during the week. The rationale provided by the Division in its partial approval letter reads:

⁶ Ms. Allen's testimony; Ms. Messerschmidt's testimony.

⁷ S's amendment request reads "104 units will be transferred to [individual day habilitation] to cover the Hawaii trip. Reducing his weekly [group day habilitation] to 3 hours a week for 8 weeks." Ex. D, p. 13. Because day habilitation activities are billed out in 15 minute increments, a transfer of 104 units would result in a reduction of S's group day habilitation services by 3.25 hours per week for those 8 weeks, which would result in him receiving 2.75 hours of group day habilitation services during those weeks.

⁸ Ex. E, pp. 21 – 25. For example, on the day that the group traveled from Juneau to Kona, that day began at approximately 8 a.m. at the Juneau airport and the group was scheduled to arrive at the group's lodging in Kona at approximately 10 p.m., a span of 15 hours, when the time difference is accounted for. See Ex. E, p. 25.

⁹ Ex. E, p. 14.

Additionally, the team asks for 104 units of Group Day Habilitation be applied to Individual Day Habilitation for the week of vacation. This reallocation request 26 hours of Group Day Habilitation, which would have been used during non-vacation time, to be utilized as Individual Day Habilitation for the week of travel. This, along with the 27 hours indicated in the paragraph above, results in a request to increase Individual Day Habilitation from the currently approved 9 hours per week to a total of 53 hours per week during the temporary absence.

Regulation 7 AAC 130.231(b)(2), which addresses Services During Temporary Absences, states, “a request for services for a recipient under this section must show that the services provided during the recipient’s temporary absence are the same as those provided when the recipient is in the recipient’s community, and are at the level approved in the recipient’s plan of care”.

Although the team, through the revised amendment was seeking to demonstrate that hours normally used in S’s community are the hours accessed to increase Individual Day Habilitation during vacation, this results in a rate of service beyond the level approved in his plan of care. The team is commended for a well-planned trip, communicating this effectively in the Amendment, and being mindful of overall costs. However, if time is used to decrease services during the waiver year, in order to significantly increase during a vacation, it impacts the efficacy of the service during much of the plan year. In other words, S’s time to address skill needs is reduced when he is not on vacation. The service frequency and duration of Day Habilitation is planned for his needs within his community, which is the intent of the Home and Community Based Waiver. This plan is to remain the same during a vacation. The team is cautioned about utilizing units from other services, not only due to the reduced opportunity to practice skills but the potential need, then, to reassess what is needed from that service to protect health and safety or prevent institutionalization.

Also, Mr. X., your willingness to cover for some of the Group Day Habilitation hours upon S’s return is a good example of exploring all resources, as natural supports, to address a need. SDS appreciates your contribution to this planning.

However, S’s desires for vacation are not the intent of the Home and Community Waiver, and a vacation is a luxury for most individuals. The intention of the waiver is to provide services that allow an individual to live as independently as possible in their community of choice. Maintaining the integrity of the person’s plan is important for meeting habilitative needs. SDS appreciates the team’s efforts to plan for this time without increasing overall costs; however, regulations guiding service amounts and definitions still apply and must be utilized as the framework within which the planning occurs.

Therefore 27 hours of Individual Day Habilitation are approved for the vacation week; and the reallocation of 26 hours of Group Day Habilitation, or 104 units, to Individual Day Habilitation, during this week of travel, is denied.¹⁰

¹⁰ Ex. D, p. 2.

On December 30, 2019, the Division’s Director issued a memorandum entitled “Clarification on Use of Day Habilitation Services Within a Support Plan Year.” The memorandum provides, in pertinent part:

Initial and renewal support plans and amendment can contain requests for day habilitation reflecting anticipated utilization patterns that are different than 12 hours/week. SDS can and will prior authorize reasonable variations in weekly usage with appropriate justification.¹¹

III. Discussion

Day habilitation is a service provided outside of the recipient’s residence, that “assist the recipient with acquisition, retention, or improvement of skills in the areas of self-help, socialization, appropriate behavior, and adaptation” and “promote the development of the skills needed for independence, autonomy, and full integration into the community.”¹² Day habilitation services are allowed to be provided during a vacation.¹³ However, the “services provided during the recipient’s temporary absence [must be] the same as those provided when the recipient is in the recipient’s community.”¹⁴

A review of the amended POC request, and the supporting schedule filed with it, demonstrates that during the vacation week, that S. was to be active in community settings (airports, airplanes, beaches, national parks, public restaurants, shopping, and other tourist activities) continuously during that week.¹⁵

The vacation week therefore provided S. with a unique opportunity to intensively practice the articulated regulatory goals of “self-help, socialization, appropriate behavior, and adaptation” and develop “the skills needed for independence, autonomy, and full integration into the community.” The Division’s partial denial letter, however, focused, not on whether the request for transferring group day habilitation hours was inconsistent with the articulated regulatory goals, but rather on that it would result in him losing access to group habilitation hours during the remainder of the year and posited that he would not receive the same day habilitation services as he received in his home community. However, as pointed out in the request, Mr. X. was willing to provide that time to S., i.e., there would not be a loss to S. during the remainder of the plan year. In addition, the evidence shows that while S's

¹¹ Ex. 1.

¹² 7 AAC 130.260(c)(1), (3) and (4).

¹³ 7 AAC 130.231(b)(3)(C).

¹⁴ 7 AAC 130.231(b)(2).

¹⁵ *See* Ex. E, pp. 21 – 25.

individual day habilitation hours would increase during the week, that the type of services would essentially remain the same.¹⁶

In a recent memorandum, authored on December 30, 2019, which was after the Division denied the portion of the amendment requesting reallocation of the 26 hour block of group day habilitation hours, the Division's Director stated that the Division "can and will prior authorize reasonable variations in weekly usage with appropriate justification."¹⁷ The facts of this case demonstrate that it is more likely true than not that S's amendment request was reasonable given the careful allocation of hours and that it was appropriately justified, given the supplied documentation, and the provision that S's need during the remainder of the plan year would be met. As a result, S. has satisfied his burden of proof and the previously denied transfer of 26 hours of S.'s group day habilitation is reversed.

IV. Conclusion

S's amendment request to transfer, in pertinent part, a total 26 hours of group day habilitation from the remainder of the plan year, to individual day habilitation during the vacation week was an appropriate request, supported by documentation provided with the application, did not result in an increase in overall service hours during the plan year, and should have been granted. Accordingly, the denial of that request is reversed.

Dated: February 27, 2020

/signed/
Lawrence A. Pederson
Administrative Law Judge

[This decision has been redacted and modified to meet OAH publication standards.]

¹⁶ S's objectives and goals for individual day habilitation are staying safe with staff in public, communication with staff when he becomes agitated and anxious, de-escalation and intervention by staff, using the bathroom appropriately including maintaining appropriate clothing, proper social interaction, selecting healthy food, shopping, dressing appropriately, and exercising. Ex. E, pp. 9 – 12.

¹⁷ Ex. 1.

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 March, 2020.

By: /signed/
Name: Doniel Wolfe
Title: Regulations & Policy Analyst

[This decision has been redacted and modified to meet OAH publication standards.]