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

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

In the Matter of	)	
	)	
K.H.	)	OAH No. 24-0293-MDS
	)	Agency No. 24-SDS-0061

DECISION

I. Introduction

K.H. is a disabled adult who receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. Mr. H. was receiving 12 hours per week of day habilitation services as a part of his 2023-2024 IDD Waiver Plan of Care (POC). His renewal POC for 2024-2025 plan year requested that his day habilitation services be increased to an average of 21 hours per week. Generally, Alaska Medicaid regulations limit day habilitation to an average of 12 hours per week. The Division of Seniors and Disabilities Services (Division) approved an average of 12 hours per week of day habilitation and denied the additional 9 hours.

Mr. H. has the burden of proof in this case. In order to receive more than 12 hours per week of day habilitation, Mr. H. must demonstrate that the additional hours are necessary to prevent him from being institutionalized or incarcerated, or that he "has a critical need for additional day habilitation services" because of one of the circumstances described in 7 AAC 130.260(c)(1)(B).[1] He did not meet his burden of proof. Accordingly, the Division's denial of the requested day habilitation services over 12 hours per week is Affirmed.

II. Facts

K.H. is a 40-year-old man with autism. Mr. H. is nonspeaking. Mr. H. recently began receiving treatment for obsessive-compulsive disorder (OCD) and depression. While he has shown some progress from that treatment, Mr. H. had only been on his new regime of medication for less than a month by the time of the hearing. Mr. H. began seeing a psychiatrist on June 12th, 2024. [2]

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1 7 AAC 130.260(c).

2 Testimony of Ms. Fontaine (whole paragraph).

Mr. H. lives at [Abc Home]. [Abc Home] is an assisted living home (ALH) housed in a 4-plex apartment complex in [rural] Alaska.[3] Mr. H. currently has his own private apartment but shares the common spaces with at least one other resident. Mr. H. has resided there since 2014.[4]

Mr. H., like many individuals with autism, requires consistency and routine. Even small changes to his routine, such as driving on a different route home, can make Mr. H. deeply frustrated or anxious. When Mr. H. becomes frustrated or anxious, he can escalate quickly and with little warning.[5]

Sometimes these escalations manifest as mild self-harm such as: biting his hand; knocking on his head; and scratching himself to the point where he develops a rash, skin breakdown, or abrasions.[6] Mr. H. also has developed a habit of jumping on and off of furniture within the home.[7] It is not uncommon for Mr. H. to develop bruises from these behaviors.[8] In cases of self-harm, staff has either cared for Mr. H. within the home, or care has been provided at regularly scheduled medical appointments.[9] Mr. H. has not required emergency medical care within the last year. Mr. H. also sometimes engages in fecal smearing.[10]

Sometimes these escalations manifest as physician aggression towards others including scratching, pushing, and grabbing staff. On one occasion, Mr. H. pushed one of his caregivers, who was pregnant, to the ground.[11] On another occasion Mr. Glasheen, while undressed, forced his way into another resident's apartment and began to damage the other resident's property.[12] Thankfully, no one was injured during these incidents. The vast majority of these escalations in the record have occurred while Mr. H. was in the ALH, however, in one incident he did grab the seatbelt of a caregiver who was driving Mr. Glasheen home via an unfamiliar route.[13] To better address situations when escalations manifest in incidents of physical

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3 Testimony of Ms. Fontaine
4 Ex. F, p. 10.
5 Testimony of Ms. Fontaine
6 Testimony of Ms. Fontaine
7 Ex. E, p. 5.
8 Letter from Zevon Davis, Resident Manager at Maple.
9 Testimony of Ms. Fontaine
10 Ex. E, p. 19.
11 Testimony of Ms. Fontaine
12 Testimony of Ms. Fontaine
13 Testimony of Ms. Fontaine

force, new interaction guidelines are being developed with the support of Hope Community Resources.[14] Until recently, staff at Mr. H's ALH were not fully communicating their concerns to Mr. Hs care communicator and his guardian.[15] However, these concerning behaviors have been going on for four years.[16] While these behaviors present challenges for staff at the ALH, the ALH has never discussed discharge as a solution with Mr. H's care coordinator.[17]

During the 2023-2024 plan year Mr. H. received an average of 12 hours of day habilitation. Mr. H. focused his day habilitation on high energy and physical activities. On Mondays Mr. H. hikes and attends other community activities, on Tuesdays he swims in the morning and hikes in afternoon, Wednesdays he goes to the gym and hikes, Thursdays and Fridays are for hiking and bowling, Saturday is a rest day, and on Sunday he attends church activities. Mr. H. also uses his day habilitation time to work on his skills in grocery shopping, volunteering, pedestrian safety, and exchanging money.[18]

Mr. H. highly values his time in the community, but Mr. H. requires one-on-one supervision, coaching, and assistance when out in the community. As a result, Mr. H. can only travel into the community when he has day habilitation or his ALH has sufficient staffing to provided one on one support.[19] Mr. H. is a high-energy individual who requires significant mental and physical stimulation to be content, and he can display an increasing level of anxiety when he is not able to spend time in the community.

In March of 2024 Mr. H. team filed a POC requesting to increase the amount of day habilitation services he receives by 9 hours per week. No additional goals or objectives were provided on the support plan to justify the 9 hour per week increase Mr. H's team is requesting. Instead, the additional hours were requested to, "to prevent aggressive behaviors that occur when outings are not provided."[20]

On April 5, 2024 the Division approved 12 hours of day habilitation services, but denied the additional 9 hours requested. The Division's denied Mr. H's request as there was no

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14 Ex. E, p. 19.
15 Ex. E, p. 20. *See also* Testimony of Ms. Fontaine
16 Testimony of Ms. Fontaine
17 Testimony of Ms. Fontaine
18 Ex. E, p. 11 (whole paragraph)
19 Ex. E, p. 34. *See also* Testimony of Ms. Fontaine
20 Ex. E, p. 33.

evidence in the request that Mr. H. was facing an observable risk to his health and safety or an impending risk of institutionalization, for which additional day habilitation was the only remedy. The Division also noted that Habilitative services are to be used as for active teaching or training within the community, while the additional services were requested to prevent behaviors taking place within the ALH. [21]

Mr. H's mother and guardian, W.H. , requested a hearing to challenge the partial denial of Mr. H. POC. The hearing was held June 17, 2024. Ms. H. represented her son and testified on his behalf. She was assisted by W.H.'s care coordinator, Sarah Fontaine, who also testified on his behalf. The Division was represented by its Fair Hearing Representative Terri Gagne. Zachary Gieszler a Health Program Manager 2, testified for the Division.

III. Discussion

A. Day Habilitation Services and Applicable Regulations

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."[22] The Division must approve each specific service as part of the Waiver recipient's POC.[23]

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. The services may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.[24]

Since 2017, day habilitation services have had a "soft cap" of 624 hours per year, an average of 12 hours per week, by regulation. However, that soft cap could be exceeded in cases where the recipient faced a risk of institutionalization and a risk to their health and safety.[25] In 2020, that regulation was repealed and readopted to read: [26]

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[21] Ex. D (whole paragraph). The Division's denial appears to be relying on the requirements of the 2017 version of 7 AAC 130.260(c). However, as Mr. H did not meet his burden of proof under the current version of 7 AAC 130.260(c) this error is harmless.

[22] 7 AAC 130.217(b)(1).

[23] 7 AAC 130.217(b)

[24] 7 AAC 130.260(b). *See also* Testimony of Mr. Gieszler (whole paragraph).

[25] In Re N.B., OAH No. 19-0442-MDS. (Commissioner of Health 7 Soc. Serv 2019). See also 7 AAC 130.260(c) (Regulation in effect as of October 1, 2017; Register 223).

[26] 7 AAC 130.260(c) (Regulation in effect as of October 1, 2020; Register 244).

The department may approve a limited amount of additional day habilitation services if **(1)** the department finds that

> **(A)** the recipient's current physical or behavioral condition places the recipient at risk of institutionalization or incarceration if additional day habilitation services are not provided;
>
> **(B)** the recipient's support plan and records indicate that the recipient has a critical need for additional day habilitation services because of one or more of the following:
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> **(i)** the recipient has an acute or degenerative physical condition that necessitates participation in activities to maintain or improve that condition that are available only in the community;
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> **(ii)** the recipient exhibits behaviors that create a risk of physical harm to the recipient or others that can only be mitigated by the development of skills related to appropriate behavior in the community;
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> **(iii)** the recipient's one-to-one support provided under 7 AAC 130.267 was recently terminated, and the recipient needs to learn skills required for living successfully in the community; or
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> **(iv)** the recipient's release from an intermediate care facility for individuals with intellectual disabilities or the criminal justice system within the current or prior support plan year increases the need for additional day habilitation services for teaching or training skills for community integration;[27]

In this context, a critical need is defined as a "… condition resulting from the recipient's circumstances that would result in institutionalization within the support plan year if additional day habitation services are not approved."[28]

B. Burden of Proof

As Mr. H. is requesting to increase the amount of day habilitation services he receives, he bears the burden of proof in this case.[29] As discussed above, to receive more than 624 hours per year Mr. H. must demonstrate that the additional hours are necessary to prevent him from being institutionalized or incarcerated, or that he "has a critical need for additional day habilitation services" because of one of the circumstances described in 7 AAC 130.260(c)(1)(B).[30] Those two prongs are addressed in detail below.

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[27] In addition to showing a critical need, recipients are also required to show, "that the recipient's medical, social, educational, or other records support the recipient's need for, and capacity to engage in and benefit from, additional active teaching or training" 7 AAC 130.260(c)(1)(C).

[28] 7 AAC 130.260(e)(1).

[29] 2 AAC 64.290(e); 7 AAC 49.135.

[30] 7 AAC 130.260(c).

C. Necessary to Prevent Institutionalization or Incarceration

As discussed above, Mr. H. does engage in some self-harming behaviors. While Mr. H's troubling behaviors were only recently disclosed to his guardians and care coordinator these behaviors have been present for four years.[31] During that time it appears that Mr. H has received at, or below, the regulatory cap of 12 hours of day habilitation per week. While concerning, none of these behaviors were severe enough to result in significant harm or to require emergency treatment. Therefore, his instances of self-harm are unlikely to result in institutionalization or incarceration.

Mr. H also engages in periods of physical aggression towards others. Ms. Fontaine provided a few examples, including one incident where Mr. H. knocked over a pregnant staff member. Ms. Fontaine also described an incident where Mr. H. "charged" into another resident's apartment, while nude, and destroyed some of that resident's property. Thankfully, no one was injured in either instance.

Ms. Fontaine argued that Mr. H's actions towards others had the potential to create a situation where staff could be injured or refuse to work with Mr. H. due to his behavior. She further argued that a lack of adequate staffing could create a situation where there was not sufficient staff to meet Mr. H's needs and the ALH might discharge Mr. H. because they are no longer able to keep him safe. As [his rural community] has extremely limited options to meet Mr. H's needs, any discharge from his current placement could place him at risk of institutionalization.

While Mr. H's team raises real concerns about his behaviors, and these behaviors certainly present challenges to staff, there is nothing in the record to indicate that Mr. H is at risk of being discharged from his placement within the plan year. Despite engaging in these behaviors toward himself and staff for several years, there is nothing in the record to indicate that his current placement has considered discharging him, let alone that there is a risk of that occurring within the plan year. Ms. Fontaine, who has been Mr. H's care coordinator for two and half years, testified that the ALH has never discussed discharge as a solution with her. Additionally, even if there was a risk of incarceration or institutionalization during the plan year, that would not be sufficient to approve additional day habilitation services.

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[31] Testimony of Ms. Fontaine.

Mr. H. must also show that he is at the risk *unless* additional day habilitation is approved. While Mr. H. deeply enjoys his community outings, and he can react negatively when there is not the support necessary to take him into the community, that is not sufficient to prove that additional day habilitation is the only solution to prevent the risk of incarceration or institutionalization during the plan year.

Mr. H's request seeks to use that additional day habilitation as a de-escalation tool.[32] While being able to take Mr. H. into the community might function as a de-escalation technique in some cases, day habilitation is not designed to be used this way. First, day habilitation usually involves a scheduled activity, and it would be difficult to use it in response to behaviors as they occurred. Second, the purpose of day habilitation is not solely to provide a distraction or to serve as a de-escalation tool, rather day habilitation services must focus on active teaching or training that helps a recipient acquire, retain, or improve the skills needed to live independently in the community. For example, day habilitation may focus on: grocery shopping; safely crossing a street, or how to utilize money.[33] Without additional goals or skills, using day habilitation as de-escalation does not fit its regulatory purpose.

Perhaps more crucially, Mr. H's concerning behaviors occur almost exclusively within the home. Day habilitation, and any additional hours over the regulatory cap, must be focused on skills to allow a recipient to integrate within the community. Here, the request is to use additional day habilitation hours to address concerning behavior that happens within the ALH. Therefore, the request is not focused on developing Mr. H's skills in the community but on decreasing disruptive behaviors within the ALH.

During the hearing Ms. Fontaine and Ms. H. were very forthright and admitted that Mr. H. may not fit cleanly within the regulations for approving additional day habilitation. Mr. H's team also discussed other potential options to improve Mr. H's behavior in the ALH, such as his new treatment regimen for OCD and depression or additional staffing within the ALH. Both of these options may prove to be better suited for helping reduce the insistence of problem behavior.

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[32] Testimony of Ms. Fontaine.
[33] Testimony of Mr. Giezler.

D. Whether Mr. H. has a "Critical need" for the 9 Additional Hours of Day Habilitation.

Of the possible reasons for having a critical need for additional day habilitation, the only subsection that fits Mr. H. situation is, "the recipient exhibits behaviors that create a risk of physical harm to the recipient or others that can only be mitigated by the development of skills related to appropriate behavior in the community".[34]

As discussed above Mr. H has exhibited some mild self-harming.[35] While these behaviors are concerning, they have not required hospitalization or emergency care. Instead, staff was able to care for Mr. H. within the ALH, or he received care at regularly scheduled appointments. There is nothing in the record to indicate that these behaviors place Mr. H. at risk of significant physical harm.

While not well documented in incident reports, there are reasons to be concerned about Mr. H risk of physical harm to others. However, to justify additional hours Mr. H. must show that this risk, "can only be mitigated by the development of skills related to appropriate behavior in the community". While Mr. H's behaviors are concerning, they occur almost entirely within his ALH. As discussed above, day habilitation is not the appropriate program to address and change these behaviors. Additionally, while it is too early to tell, his new mental health treatment regimen may address some of the underlying conditions that result in Mr. H. becoming aggressive towards himself or others.

Mr. H is an energetic individual who, like anyone, desires a full and engaging life. Particularly, Mr. H highly values his time out in the community and enjoying all that [his community] has to offer. Unquestionably, he benefits from that time. However, Medicaid is a government-funded safety net to provide services for low-income and disabled citizens. As a part of qualifying and receiving benefits, applicants must fit within a patchwork of regulations. Medicaid's regulations similarly bind the Division, this Administrative Law Judge and the public.[36] The Alaska Medicaid regulations limit day habilitation services to 12 hours per week, unless additional hours are necessary to prevent a recipient from being institutionalized or incarcerated, or the recipient "has a critical need for additional day habilitation services" because of one of the circumstances described in 7 AAC 130.260(c)(1)(B).[37] While the evidence in this

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34 7 AAC 130.260(c)(1)(B)(ii).
35 Testimony of Ms. Fontaine.
36 *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010)
37 7 AAC 130.260(c).

case shows that Mr. H. benefits from day habilitation services, and that his behaviors present challenges for staff at his ALH, Mr. H. has not met his burden to proof in this case.

IV. Conclusion

Mr. H. bears the burden of proof in this case. He did not meet it. Accordingly, the Division's partial denial is AFFIRMED.

Dated: July 10, 2024

Eric M. Salinger
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health, 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 25 day of July, 2024.

[redacted]

Name: Eric M. Salinger
Title: Administrative Law Judge