

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

In the Matter of)
)
L.H.) OAH No. 19-0627-MDS
) Agency No. 19-SDS-0237
_____)

DECISION

I. Introduction

L.H. receives Medicaid services under the Individuals with Intellectual and Developmental Disabilities Home and Community Based Waiver. Although he might be eligible for a wider range of services, L’s family provides for most of his day-to-day needs, and he and his team have only sought two types of waiver services: group day habilitation (“day hab”) and respite services. This appeal concerns L’s day hab services.

L’s 2018-2019 Medicaid Waiver Plan of Care provided for 20 hours per week of day hab services focused on three goals, each of which related to his health or safety. His renewal Plan for the following year provided for the same amount of day hab, but the Division of Senior and Disabilities Services (“Division”) approved only 12 hours per week. L, through his family, appeals.

This decision concludes that, under the unique facts of this case, the Division failed to show that the proposed reduction of L’s day hab hours to 12 would not jeopardize his health and safety. Accordingly, the Division’s decision is reversed.

II. Day Habilitation History and Overview

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.”¹ The Division must approve each specific service as part of the recipient’s Support Plan.²

Day hab services are provided outside the recipient’s residence and are restricted to specified purposes. The purpose of day hab services is to assist the recipient with acquiring, retaining, or improving his or her self-help, socialization, behavior and adaptive skills. The

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

² 7 AAC 130.217(b); *see also* Ex. B, p. 6.

services may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.³

The regulation applicable to day habilitation services was amended in October 2017.⁴ Under current law, day habilitation services of over 624 hours per year (i.e., an average of 12 hours per week) must be “justified” as necessary to protect the recipient’s health and safety or to prevent institutionalization.⁵

III. Facts⁶

A. Background

L H is a 27-year-old man who lives in Anchorage with his parents[.]. L experiences intellectual disability due to Down Syndrome. L is by all accounts a pleasant and generally happy young man. He enjoys a quiet and stable home life with his parents. His mother does not work outside the home, and considers it her “only job [to] maintain L’s health and safety.” Because his siblings have grown and moved out of the home, L no longer has the opportunity to interact with same-age peers in the home. He can tend to isolate himself into movies or music in the home – behaviors his family has seen lessen since he has begun participating in day habilitation services outside the home.

Maintaining L’s health and safety is challenging due to his significant communication deficits and complete lack of safety awareness outside the home. While L can say a few individual words, he is functionally non-verbal. His communication skills have been assessed to be in the “severely impaired” range, and L’s team considers his biggest obstacle to be his inability to communicate. For example, he will not actively express discomfort unless he is asked directly whether he is uncomfortable. This communication skill deficit places L’s health and safety at risk.

L also has significant problems with judgment and decision-making, requiring a great deal of supervision because of his lack of safety awareness. While L has safety awareness at home, he cannot generalize that skill into other settings. He will run into the street or through parking lots without looking for cars. He is unaware of social norms. He would walk off with a

³ 7 AAC 130.260(b); see also Ex. B, p. 17.

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

⁵ 7 AAC 130.260(c); Exh. B, p. 17; SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2008, available at <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>.

⁶ The facts herein are taken from the testimony at hearing and the written evidence, and are found by a preponderance of the evidence.

stranger if asked to do so. His compliant nature creates a safety risk vis-à-vis strangers. As a result of his lack of safety awareness, L “absolutely” cannot be in the community unattended.

In addition to the communication and safety concerns, L requires ongoing assistance and reminders with all activities of daily living.

B. L’s use of day habilitation services

L began using Waiver services in 2016, and has used day habilitation services since that time. He originally received more hours than are currently in his plan, but his team has been able to reduce his hours by identifying activities and providers which are most successful with L.

L currently uses his day habilitation time to attend activities at [Provider], Inc., an Anchorage-based provider catering to young adults. [Provider]

offers a community based small group recreation, continuing education, and day habilitation program. [Its] focus and mission is on connecting young adults who experience differing abilities together to help support and facilitate friendship development, social skills building, health and nutrition, recreation and leisure, volunteerism in the community, and self-advocacy.⁷

Currently, L attends [Provider] for six hours per day on Monday, Tuesday, and Friday, and for a two-hour late afternoon program on Thursday. He is well-liked at [Provider], and he enjoys his time there. Particularly now that his siblings have grown up and moved out of the family home, day hab is L’s only time for socializing with same-age peers.⁸

L’s team sees day hab as “the one area that he needs support.” Having no “core group of friends” or other natural opportunities to work on socialization and communication skills, day hab provides that, giving him an opportunity “to interact with different people on different levels and in different ways.” L’s family has seen him “blossom” with the day hab services he is receiving, and considers those services vital to his “social emotional health.”

L’s day hab goals and objectives for the 2018-2019 plan year included making healthy food and hydration choices, increasing his participation in physically active activities, increasing personal hygiene skills, and increasing his social and communication skills. As to this final category, his objectives included indicating a preferential choice when offered options, reciprocating non-verbal communication, and respecting others’ “body boundaries.”⁹

⁷ Ex. E, p. 19.

⁸ Care coordinator testimony (“He loves going to [Provider] and recreating and interacting with his friends, being physically active, working on communicating and understanding personal boundaries and safety. This is his only opportunity to interact with his same age peer group.”).

⁹ Ex. E, pp. 20-21.

L's day hab goals and objectives for the 2019-2020 plan year are aimed at (1) healthy living choices (with objectives related to hydration, physical activity, and hand-washing); (2) increasing his communication skills across all environments (with objectives related to making preferential choices, and communicating "excuse me" when navigating through crowded areas); and (3) increasing his safety skills in the community (with an objective to keep his head up and attend to his surroundings when walking through parking lots or crossing the street).¹⁰

C. Plans of Care/Support Plan

L's 2018-2019 Plan of Care provided for 20 hours of day hab.¹¹ The division initially reduced that to 12 hours, citing its regulation change. L appealed that reduction. Because of a federal class action lawsuit regarding the regulation, the Division settled with L and allowed 20 hours per week of services for the 2018-2019 plan year.

When L applied to renew his Plan for the 2019 – 2020 plan year, the only Waiver services requested were a continuation of the 20 hours per week of day habilitation services, as well as 10 hours per week of respite.¹² The Plan acknowledges the regulation change, and asks for consideration of the extra hours. The Plan (as well as testimony at the hearing) emphasized the person-centered approach taken by L's team, urging that L requires these extra hours because they are so critical to his acquisition and development of communication, socialization, and personal safety skills. The Plan expressly noted that L could not practice the skills at issue – necessarily community-based applications of health and safety skills – unless he was *in* the community.¹³

At the hearing in this matter, L's mother elaborated, explaining that while the family takes care of all of L's health and safety needs at home, they "cannot replace a peer group or provide the same opportunities for skill-building and skill-generalizing in other environments." Due to L's significant deficits in social and communication skills – where testing places him close to a one year old child, compared with his overall age equivalency of a 3¼ -year-old

¹⁰ Ex. E, pp. 17-19.

¹¹ Ex. E, p. 19.

¹² Although the plan also includes respite services, L's family has mostly been unsuccessful in trying to arrange and use those services. Services must be provided by an approved agency. Because L uses so few waiver services, the family has not found an agency that will take them on for respite only. [Provider] offers respite, but generally does not have enough staff available to provide it.

¹³ Ex. E, p. 19.

child – his team expressly focused on day habilitation as the means by which L could work on those skills.

L’s team noted that since the implementation of the 12-hour-per-week “soft cap,” they had “made a conscious effort at reducing services to what L was most benefiting from.” As described by his Care Coordinator:

[L] is not able to access the community on his own. He is non-verbal and has no safety awareness. He has to have support staff who are familiar with him to help him work on social skills in a group. Services were requested due to his health and safety needs and his inability to access other waiver / PCA supports to meet his needs.

While acknowledging that “no one has a crystal ball,” L’s team urges that reducing his “time in a healthy positive environment” would pose “serious health risks” such as “mental health, depression, withdrawal, and isolation,” particularly given his tendency to isolate himself with movies and music at home.

In its review of the 2019-2020 Support Plan, the Division approved the requested respite hours, but reduced L’s day hab from 20 hours per week to 12 hours per week. The Division’s rationale was that L did not have the health and safety needs or risk of institutionalization necessary to receive more than 12 hours per week of day hab.

D. Procedural history

The Division notified L’s family of the reduction in June 2019. They appealed, and the matter was referred to the Office of Administrative Hearings. The matter was initially stayed while the parties attempted to resolve the matter through mediation. Mediation was unsuccessful and a hearing was held on August 16, 2019. L was represented by his mother, S.H., and his care coordinator, Jeanne Moore-Ketrell, both of whom testified on this behalf. Victoria Cobo-George represented the Division. Esther Hayes, the Health Program Manager who reviewed the Support Plan, also testified. At my request, the written statements of Ms. Moore-Ketrell and Ms. H were filed on August 20, 2019, and entered into the record.

III. Discussion

A. *Burden of Proof*

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.¹⁴ 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.¹⁵ 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 by regulation at 12 hours per week unless justified by health, safety, or institutionalization concerns. 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. But 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.¹⁶

Here, as found above, L's day habilitation hours have been and continue to be focused on his health and safety – and, specifically, his ability to maintain health and safety in environments outside his home. His day hab goals and objectives for the prior plan year included making healthy food and hydration choices, increasing his participation in physically active activities, increasing personal hygiene skills, and increasing his social and communication skills.¹⁷ These are inherently health- and safety-related skills. Because L's prior allocation of 20 hours per week was for health- and safety-related day hab services, in order to reduce those hours, the Division must show why the health and safety considerations no longer justify the higher amount.

¹⁴ 7 AAC 49.135.

¹⁵ See 7 AAC 130.260(c).

¹⁶ *In re: N.B.*, OAH No. 19-0442-MDS, pp. 3-4 (adopted August 2019).

¹⁷ Ex. E, pp. 20-21.

B. The parties' positions

It is undisputed that L greatly enjoys his day habilitation time at [Provider] and has thrived there. But, particularly considering the Division's new regulation, the legal standard requires more. Day hab hours in excess of 12 hours per week must relate to health and safety (or a risk of institutionalization, which is not an issue in this case). And because the Division is proposing to reduce L's hours, it must show that a reduction is unlikely to jeopardize his health and safety.

The Division argues that L does not show any of the danger signs of behavioral or physical health problems that typically warrant disregarding the soft cap. And the Division's questions at hearing implied that some of the communication and related skills could be worked on at home or in other settings outside of day hab.¹⁸

L's family argues that the Division has failed to show why his hours allocation should change, given the importance of the skills being worked on and the success he has had at the level of 20 hours per week.

L's family feels that he needs more than 12 hours per week of day hab to work on health and safety skills he cannot address elsewhere, and that reducing his day hab to just 12 hours will more likely than not jeopardize his health and safety by subjecting him to an unreasonable risk of mental health problems, including depression, isolation, and withdrawal.

C. Has the Division shown that health and safety concerns no longer warrant day habilitation services in excess of twelve hours per week?

The Division's Support Plan template provides the following definition for habilitative services:

Habilitative services support the person to acquire, build or retain skills in the following areas, including but not limited to: Mobility/Motor skills, Self-care/ Personal Living, Communication, Learning, Self-direction/Social skills, Living skills/ Community Living, Economic self-sufficiency/ Vocational skills.

Habilitative services support self-help, socialization and adaptive skills aimed at raising the level of physical, mental, and social functioning of an individual.¹⁹

¹⁸ The Division's representative queried whether L's mother took time at home to "discuss" safety and health issues with L. L's mother responded by explaining that L's communication skills are not at a developmental level where he can engage in "discussions."

¹⁹ Plan, p. 15.

L's day hab goals – a self-care goal related to nutrition and hygiene, a communication goal, and a physical safety goal – are plainly “habilitative.”²⁰

On his communication goal, L's team reports having seen an improvement in his “boundary skills” since he began addressing communication goals through day hab. Because these skills are necessarily exercised through social communication, day hab is L's main if not sole venue for working on these skills. He is now able to indicate who he wants to spend time with, has improved his non-verbal communication and self-advocacy, and is working on other social communication skills. In particular, L continues to work on advocating for his own personal boundaries – for example responding and advocating for himself when other people are “hugging him and hanging on him.” L's team and his written plan both support a finding that he continues to have a high need for significant assistance in safety-related communication skills. Without further work in this area, he remains at risk from those with ill intentions.

L's support plan and his team's testimony also support a finding that he requires assistance and support with physical safety skills. On his new-this-year goal of increasing his safety skills in the community, L's support plan explains the dangerous behaviors addressed by this goal, as well as the plan for addressing it:

L tends to cross streets before looking, which without staff support could look like walking straight into oncoming traffic or the path of a reversing vehicle. Staff will assist L in being physically aware of his environment through discussion, role-play, and safety demonstrations. Staff will ask L if it's safe to proceed before crossing any street or moving through parking lots, waiting for a thumbs-up or other form of acknowledgement before moving. Staff will additionally remind L to keep his head up, looking for cars and taillights of cars pulling out of parking spaces, etc. L requires staff support while IN the community to develop the skill. Staff will actively engage in real time role modeling while there.²¹

In order to prevail in this case, the Division must show that L's day habilitation hours can more likely than not be reduced without jeopardizing his health and safety. It did not meet that burden. L's mother and care coordinator both reiterated in their testimony that L's need for safety skill development through day hab is specific to his need to develop and practice such skills in the community context. Both witnesses testified that an inability to generalize skills is characteristic of Down Syndrome, and is the reason that L needs to relearn and practice safety skills he has mastered in one place (home) in new places (the community). By definition, these

²⁰ As noted above, each of the three goals is also related to his health and safety.

²¹ Ex. E, p. 19.

are skills he cannot practice at home or with his parents. L needs to learn, develop, and reinforce these skills in the community, amongst strangers, outside his parents' presence. And doing so is necessary for his health and safety. The same is true for his need to develop and practice social communication skills beyond his family, and with peers.

To the extent the Division criticizes L's team as improperly relying on day hab to meet "socialization" needs, this concern is also misplaced. The Division's own definition of habilitation services on the support plan form itself notes that "habilitative services support ... socialization [skills] aimed at raising the level of [and individual's] social functioning." When day hab allows L to improve his boundary skills and his awareness of social norms, these are habilitative services that raise his level of social functioning. This is particularly so in L's situation, where his communication and personal safety skills are so intertwined with socialization skills. Knowing when to give a hug versus a high five is a socialization skill, and one which L has worked on in day hab, but it is also a communication and a safety skill. Because it allows L to interact with many different people in different ways and at different levels, L's access to day hab is a unique opportunity to grow his health and safety skills outside the home. That he is doing so through improved "socialization" skills does not negate the habilitative value of these services, nor their nexus to L's health and safety.

At the same time, to the extent L's team suggests that he should receive more hours than in the 12-hour soft cap because as social beings all humans need more than twelve hours per week of social interaction for their mental health, this argument is problematic. Taken to its logical conclusion, accepting this argument requires ignoring the cap for every recipient. In order for the cap to have meaning, the "health and safety" protection implicated in the exception must be unique to the specific recipient, and not just a broad statement about mental health generally.

Here, however, the evidence *does* support that L's day hab services are used for health and safety purposes – specifically, to promote his mental health, his physical health, and his safety in the community – and that in the unique context of his specific person-centered Support Plan, it is more likely true than not true that reducing these services would jeopardize his health and safety.

IV. Conclusion

Because L's current day habilitation services are for health and safety purposes, and because the Division did not prove that reducing his current level of hours would not jeopardize his health and safety, the Division's decision to reduce L's day habilitation hours from 20 hours per week to 12 hours per week is reversed.

Dated: September 19, 2019

/signed/ _____
Cheryl Mandala
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 4th day of October 2019.

By: /signed/ _____
Name: Cheryl Mandala
Title: Deputy Chief Administrative Law Judge

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