

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

In the Matter of)
)
K.K.) OAH No. 19-0700-MDS
) Agency No. 19-SDS-0268
_____)

DECISION

I. Introduction

K.K. is a disabled adult who receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. His 2018 – 2019 Plan of Care (POC) provided him with an average of 12 hours per week of day habilitation services. Mr. K. applied to renew his POC for 2019 – 2020 and requested that he receive 16 hours per week of day habilitation services, an increase of 4 hours per week. The Division of Senior and Disabilities Services (Division) approved the plan of care overall but only allowed 12 hours of day habilitation services per week. Mr. K’s mother, Barbara Bailey, who is his legal guardian, challenged the Division’s decision.

The Alaska Medicaid regulations limit day habilitation services to 624 hours per year, or an average of 12 hours per week for 52 weeks, unless a waiver recipient faces institutionalization or risk to his health and safety without additional day habilitation hours. Because Mr. K has the burden of proof, he must demonstrate that the increase in hours is necessary to avoid institutionalization or a risk to his health and safety. He has not met his burden of proof. Accordingly, the Division’s decision to keep his day habilitation hours at an average of 12 hours per week is AFFIRMED.

II. Facts

A. Background

Mr. K is 44 years old. He is has tuberous sclerosis, is intellectually disabled, has a seizure disorder, is blind in one eye, and is primarily non-verbal.¹ Mr. K lives in an assisted living home with his long-time caregivers N.P. and her husband.² They are ageing, which impacts their ability to take Mr. K into the community. For instance, Ms. P. has needed to use a

¹ Ex. E, pp. 3 - 4, 7; Ex. G.

² Ex. E, pp. 1, 8.

walker for approximately a year.³ Mr. K's mother and legal guardian, C.C. , resides in the same community as he does, and sees him frequently.⁴

B. Mr. K's IDD Plans of Care

Mr. K receives waiver services through the IDD program. In addition to residing in an assisted living home (family home habilitation), his services include individual day habilitation, daily respite, and hourly respite.⁵ Mr. K's day habilitation services are the subject of the current dispute.⁶

1. Mr. K's 2018 – 2019 Plan of Care

Mr. K's 2018 – 2019 POC was approved for a total of 12 hours per week of day habilitation services.⁷ The primary focus of Mr. K's day habilitation services, as described in his goals and objectives, was physical exercise, along with socialization, accessing the community, and increasing his independence.⁸

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 amended certain Medicaid regulations, including the regulation governing day habilitation hours. That amended regulation, which went into effect on October 1, 2017, reads:

The department will not pay for more than 624 hours per year of any type of day habilitation services from all providers combined, unless the department approves a limited number of additional day habilitation hours that were

- (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.⁹

After litigation over procedural errors in how the new regulation was implemented, the Department entered into a settlement, agreeing to temporarily change how the Division would apply the new regulatory cap to requests for day habilitation services:

³ C.C.'s testimony.
⁴ C.C.'s testimony;
⁵ Ex. E, p. 2.
⁶ Ex. D; Ex. E, p. 2.
⁷ Ex. F, p. 1.
⁸ Ex. F, pp. 21 – 23.
⁹ 7 AAC 130.260(c).

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.¹⁰

3. *Mr. K's 2019 – 2020 Plan of Care*

Mr. K submitted his POC renewal for July 15, 2019 through July 14, 2020 to the Division. In that POC, he requested that he continue to receive an average of 16 hours of day habilitation services per week, an increase of four hours per week from the previous plan year. His day habilitation goals and objectives were largely the same as those contained in the previous plan year, physical exercise, along with socialization, accessing the community, and increasing his independence.¹¹

C. *The Division's Review and Partial Denial*

On July 5, 2019, the Division notified Mr. K that his day habilitation hours approved for 12 hours per week, and that the request for the other four weekly day habilitation hours was denied.¹² The Division's notice based its reasoning for the denial of the additional four hours on there being no indication that Mr. K's health and safety would be compromised, or that he faced a risk of institutionalization, if he did not receive more than 12 hours per week of day habilitation services.

D. *Appeal*

Mr. K's mother/guardian requested a hearing to challenge the denial of Mr. K's request for an increase in his day habilitation services. The hearing for that appeal was held on September 16, 2019. Terri Gagne represented the Division. Division Health Program Manager Glenda Aasland testified for the Division. C.C., Mr. K's mother and court-appointed guardian, represented him and testified on his behalf. Mr. K's Medicaid Care Coordinator also testified on his behalf, as did Provider A and Provider B, both of whom are with Mr. K's day habilitation and respite provider. All exhibits were admitted without objection.

¹⁰ SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2018, *available at* <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>. The parties are also directed to the July 2018 settlement agreement filed in *R. L., et. al., v. State, DHSS, DSDS, U.S. District Court for the District of Alaska Case No. 1:18-CV-00004-HRH*.

¹¹ Ex. E, pp. 20 – 22.

¹² Ex. D.

E. Day Habilitation Activities

Mr. K uses his day habilitation services to exercise and to be active in the community. He goes swimming up to three times per week, which takes a total of approximately three hours each time. He also works out at the gym and goes for walks and hikes. He is not active when he is at home and has gained weight.¹³

F. Behavioral Issues

Both the 2018 – 2019 POC and the 2019 – 2020 POC provide that Mr. K will occasionally slap himself or cry for an unknown reason and may become violent.¹⁴ This is not a new behavior.¹⁵ Mr. K’s assisted living home provider has not reported any slapping, but Provider B and other staff have noticed it, along with an increase in Mr. K’s weight.¹⁶ Provider A has observed a negative change in Mr. K’s behavior along with him acting sadder over the past several years, which he correlates to a decrease in day habilitation hours. However, Provider A could not give an estimate of how often Mr. K engages in self-injurious behavior (slapping himself) because he has no direct personal knowledge of that behavior.¹⁷ Ms. Bailey has noticed the slapping, but saw it only once in the week immediately preceding the hearing in this case. She has seen him crying and acting depressed.¹⁸

III. Discussion

A. Day Habilitation Services and Applicable Regulation

The Medicaid Waiver program pays for specified individual services to Waiver recipients, if each of those services is “sufficient to prevent institutionalization and to maintain the recipient in the community.”¹⁹ The Division must approve each specific service as part of the Waiver recipient’s POC.²⁰

The type of waiver services at issue here, day habilitation services, are provided outside the recipient’s residence. The purpose of these services is to assist the recipient with acquiring, retaining, or improving his or her self-help, socialization, behavior, and adaptive skills. They

¹³ Provider B’s testimony; Provider A’s testimony.

¹⁴ Ex. E, pp. 11 – 12; Ex. F, pp. 14 – 15.

¹⁵ Provider A’s testimony.

¹⁶ Provider B’s testimony.

¹⁷ Provider A’s testimony.

¹⁸ C.C.’s testimony.

¹⁹ 7 AAC 130.217(b)(1).

²⁰ 7 AAC 130.217(b).

may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.²¹

Before October 2017 the applicable regulations did not limit the number of day habilitation hours available to a recipient, unless the recipient also received group-home habilitation services.²² In October 2017, 7 AAC 130.260(c)—the regulation governing the day habilitation services—was amended to limit day habilitation services to 624 hours per year (an average of 12 hours per week for an entire year) unless a greater number was necessary to “protect the recipient’s health and safety; and ... prevent institutionalization.”²³ So, under the amended regulation, the need for a larger amount of day habilitation hours must be justified by health and safety concerns and by a showing that without the additional day habilitation services, the recipient will face institutionalization. As discussed above, after litigation over how the new regulation was implemented, the Department entered into a settlement, agreeing to temporarily 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.²⁴

B. Burden of Proof

In a case where the recipient is requesting an increase in services, the recipient bears the burden of proof, by a preponderance of the evidence, to show that the reduction is justified.²⁵

C. Whether more than 12 hours per week of day habilitation services are necessary to protect Mr. K’s health and safety or prevent institutionalization.

While the revised regulations limit the number of weekly habilitation hours to 12 unless more is necessary to protect the recipient’s health and safety or prevent institutionalization, the regulations do not define or quantify the protection to health and safety, or risk of institutionalization associated with this exception.

The evidence in this case shows that Mr. K does engage in some minor self-injurious behavior, which consists of occasionally slapping himself. He has also gained some weight. The people most familiar with him say he seems sadder. However, what the evidence is lacking is a

²¹ 7 AAC 130.260(b).

²² 7 AAC 130.260(c). (Regulation in effect from July 1, 2013 through September 31, 2017).

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

²⁴ SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2018 (emphasis added), available at <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>.

²⁵ 7 AAC 49.135.

