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

In the Matter of	)	
	)	
L. X.	)	OAH No. 23-0428-MDS
	)	

DECISION

I. Introduction

L. X. is an extremely disabled young woman who receives both Medicaid Home and Community-Based Waiver ("Medicaid Waiver") services and Medicaid Personal Care Services (PCS). She filed an amended Medicaid Waiver Support Plan of Care requesting that she receive 30 hours per week of Supported Living Services.

The Division of Senior and Disabilities Services (Division) partially approved her amended Plan of Care, providing her with five hours per week of Supported Living Services and denying the remainder of the request. Ms. X.'s Guardian and Mother, L. G., requested a hearing on her behalf. That hearing was held on August 30, 2023. Ms. G. represented Ms. X. and testified on her behalf. S. T., Ms. X.'s Medicaid Care Coordinator, also participated in the hearing and testified on Ms. X.'s behalf. Terri Gagne, a Fair Hearing Representative for the Division, represented the Division. Tammy Smith, a Health Program Manager with the Division, testified on its behalf.

The evidence presented at hearing demonstrated that the bulk of Ms. X.'s request did not satisfy the regulatory requirements that Supported Living Services involve an active training component for acquiring or maintaining skills, as opposed to regaining those skills after they had been lost. Accordingly, the Division's limited approval of Ms. X.'s amended Plan of Care to provide five hours per week of Supported Living Services is AFFIRMED.

II. Facts

Ms. X. is a 23-year-old Medicaid Waiver recipient. She lives with her family. She is severely disabled with diagnoses of Encephalopathy, Epilepsy with recurrent seizures, and Intellectual Disability. She is nonverbal, non-ambulatory, is either bedbound or wheelchair bound, and has a g-tube for nutritional intake. She is completely dependent upon others for all her activities of daily living. Her communication skills are limited, essentially consisting of

facial expressions, cries, laughter, and other vocalizations. She can say "Mama" and her sister's name "B." She also has poor vision.[1]

Ms. X. has been receiving 32.67 hours of PCS services, which include total assistance with tasks such as dressing, eating, personal hygiene and bathing.[2] In the spring of 2023, she was also receiving Medicaid Waiver services in the form of Medicaid Care Coordination and Respite. She requested that her Medicaid Waiver Plan of Care be amended to include 30 hours per week of residential habilitation supported living services.[3]

Following a considerable amount of interaction between Ms. X.'s Medicaid Care Coordinator and Division personnel following the initial filing of Ms. X.'s amended Plan of Care,[4] the amended Plan of Care identified four specific goals, with corresponding objectives and interventions, to be met through the provision of supported living services.

Goal 1 is for Ms. X. to complete a daily hygiene routine. Specifically, her objectives are to brush her teeth with staff providing "hand-over-hand" assistance to brush her teeth, to shower or bathe with "hand-over-hand" assistance, and to dress herself with staff intervention. The bathing objective notes indicates that she "requires complete Staff Assistance to perform Her bathing routine." The intervention description for toothbrushing provides that the staff is to provide hand-over-hand assistance and that she is "unable to brush her own teeth" without staff assistance. The intervention description for bathing provides that she "requires complete staff assistance." The intervention description for dressing provides that she "is unable to dress herself" and that staff is to select her outfits and physically dress her.[5]

Goal 2 is that Ms. X. is to "maintain adequate nutrition and health." Her objectives are to reposition herself with staff assistance, increase her mobility by sitting up in her bed, to utilize her wheelchair, and maintain adequate nutrition using her G-tube. The interventions each describe complete staff assistance with each of these objectives. For repositioning, the intervention states that she is unable to reposition herself. For increasing mobility, the intervention states that she lacks "independent mobility and requires Staff to assist her in sitting up." For utilizing her wheelchair, the intervention provides that staff is to transfer her using a

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1 Ex. F, pp. 4 – 5, 10.
2 Ex. L.
3 The initial request was that Ms. X. receiving Supported Living Service in lieu of PCS. *See* Ex. F, p. 23.
4 *See* Ex. G.
5 Ex. F, pp. 15 – 16.

mechanical lift, or lifting her, and assisting her in moving into her wheelchair. For maintaining nutrition, the intervention states that staff is to assist her with eating by G-tube and using hand-over-hand to help her eat baby food.[6]

Goal 3 is to increase Ms. X.'s communication skills. Her objectives are to practice use of communication devices, and to communicate vocally (words or vocalizations), and facial gestures. The intervention for practicing using a communication device describes familiarizing Ms. X. with the device and teaching her to use it by pressing a button with her hand or foot. The intervention for vocalization or facial gestures simply describes staff learning to recognize her vocalizations and facial and body movements.[7]

Goal 4 is for Ms. X. to "engage in diversional or recreational/entertainment activities." The objective is for her to engage in "recreational/entertainment activities daily." The intervention provides that she is to watch television and movies and be read to. Staff is to monitor her for her engagement.[8]

The Division denied all but 5 of the requested 30 weekly hours of supported living. In its denial letter, it discussed how Goals 1 and 2 were denied in their entirety because there was essentially no skill building component, given Ms. X.'s functional capacity. Goal 3, objective 3.2, which was the communication component utilizing staff observation was denied because there was no teaching component. Goal 3, objective 3.1, teaching Ms. X. to use a communication device, was not denied. Goal 4, which involved Ms. X. watching television/movies and being read to, was partially denied as not being skill building. However, the Division partially approved that Goal because it involved Ms. X. being taught the skill of engaging in recreational/entertainment activities.[9]

Ms. G., Ms. X.'s mother, credibly testified that Ms. X. had recently had more functional skills, such as being able to actively participate in dressing, getting into her chair, and grabbing items and that she had lost those skills since she left school. Her desire was that Ms. X. would be able to develop more independence similar to what she had while she was in school.

III. Discussion

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6 Ex. F, pp. 16 – 17.
7 Ex. F, pp. 17 – 18.
8 Ex. F, p. 18.
9 Ex. D, pp. 6 -7; Ex. F, pp. 15 – 18.

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.[10] The 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."[11] The Division must approve each specific service as part of the Waiver recipient's Plan of Care.[12]

The type of Waiver services at issue here, supported living services, can be provided in a recipient's own home. They fall in the general category of residential habilitation services.[13] The services must be "provided in accordance with the department's *Residential Habilitation Services Conditions of Participation."*[14] The *Conditions* document, which is adopted into regulation,[15] states:

> Residential habilitation services may be provided to assist recipients to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to maximize independence and to live in the most integrated setting appropriate to the recipient's needs.
>
> * * *
>
> The activities provided as residential habilitation services must be planned with the objective of maintaining or improving the recipient's physical, mental, and social abilities rather than rehabilitating or restoring such abilities.[16]

This case therefore presents two issues. First, do the stated goals "assist [Ms. X.] to acquire, retain, and improve [her] self-help, socialization, and adaptive skills?" Second, do the stated goals maintain or improve her abilities rather than "rehabilitating or restoring" them?

The denied goals, objectives, and interventions clearly describe Ms. X. not actually being trained to perform most of the stated goals. For Goal 1, performing daily hygiene, staff brush her teeth, dress her, and bathe her. Her only participation consists of the staff utilizing "hand-over-hand" assistance. In essence, staff does all the work, while moving Ms. X.'s hands/limbs in accompaniment.

For Goal 2, maintaining adequate nutrition and help, the objectives are repositioning, increasing her mobility, using her wheelchair, and eating (g-tube and baby food). The

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10 7 AAC 100.002(d)(8); 7 AAC 100.502(d).
11 7 AAC 130.217(b)(1).
12 7 AAC 130.217(b).
13 7 AAC 130.265(a) and (d).
14 7 AAC 130.265(a)(2) (emphasis in original).
15 7 AAC 160.900(d)(45).
16 Ex. B, p. 96.

accompanying interventions indicate that staff will be doing all the work. Staff will be physically moving her and feeding her, without any activity on Ms. X.'s part except for totally passive/physical manipulation by staff. There is no description of her being trained to develop any part of those physical functional abilities herself.

For Goal 3, developing communication skills, the objectives are to teach Ms. X. how to utilize a communication device, and also have her communicate using vocalization, facial expressions, and body gestures. The accompanying interventions indicate active training with the communication device; however, the other component essentially consists of staff learning Ms. X.'s vocal/expressive/bodily gesture communication methods, and not training her in expanding them.

For Goal 4, engaging in recreational/entertainment activities, the objective and described intervention, essentially consists of Ms. X. engaging in passive entertainment activities such as being read to and watching television/movies. There is a very limited active training component, which basically is having Ms. X. being encouraged to assist in the selection of the activity.

The described goals, objectives, and the intervention methods used to achieve those goals and objectives, all demonstrate that Ms. X. is for the most part a completely passive participant in the goals and objectives. Only two of the objectives (Goal 3, objective 3.1, Goal 4, objective 4.1) demonstrate active engagement and training, in that she is being trained in using a communication device, and she is being encouraged to assist in choosing a recreational/entertainment activity.

Given the extent of the time originally requested for all the proposed goals and objectives was 30 hours per week, the Division's allotment of five hours per week for Goal 3, objective 3.1 and Goal 4, a portion of objective 4.1, is reasonable.

It must also be noted that Ms. G.'s credible testimony established that Ms. X.'s functional skills have deteriorated since she stopped attending school, she used to be able to minimally participate in dressing, help get into her chair, and help grab items. The goals and objectives seek to help Ms. X. regain some of those skills. However, the supported living *Conditions of Participation* only allow training to maintain or improve her abilities, and do not allow training to rehabilitate or restore them.

In summary, the evidence demonstrates that there are two independent reasons for the limited approval of Ms. X.'s amendment request. First, the stated goals, objectives, and

interventions, do not for the most part involve Ms. X. acquiring, retaining, or improving her "self-help, socialization, and adaptive skills necessary to maximize independence and to live in the most integrated setting appropriate to the recipient's needs." Second, the thrust of most of the goals, objectives, and interventions, describe either completely passive participation or rehabilitating/restoring skills, rather than her acquiring, retaining, or improving them. The evidence therefore shows that approval of Goal 3, objective 3.1 (communication device training/use), and a portion of Goal 4, objective 4.1, encouraging Ms. X. to choose an entertainment/recreational activity, meet the regulatory requirements for acquiring, retaining, or improving her skills. The amount of five hours is adequate to meet these objectives.

IV. Conclusion

The Division's limited approval of Ms. X.'s Medicaid Waiver Amended Plan of Care allowing five hours per week for Supported Living Services is AFFIRMED.

Dated: September 25, 2023

Signed

Lawrence A. Pederson
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 10th day of October, 2023.

By: *Signed*
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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