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

In the Matter of	)	
	)	
N. X.	)	OAH No. 23-0719-MDS
	)	

DECISION

I. Introduction

N. X. receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. His 2022 – 2023 Plan of Care (POC) provided him with 4,784 units of residential habilitation in-home supports (in-home supports), for an average of 23 hours per week.[1] N. utilized this in-home supports in larger amounts during non-Support Camp A weeks, than during Support Camp A weeks.[2] In October 2023, N.'s team submitted a new POC for 2023-2024 seeking a total of 4,160 units of in-home supports, or an average of 20 hours per week.[3] Relevant to this decision, that POC sought to reduce N.'s usage of in-home supports during the 41 non-Support Camp A weeks to 20 hours per week, and increase his in-home supports during the 11 Support Camp A weeks to 20 hours per week.[4] Essentially, his POC was seeking to "transfer" some of his non-Support Camp A hours to Support Camp A weeks, so that N. would have a consistent 20 hours of in-home supports a week.[5]

On November 6, 2023, the Division of Senior and Disabilities Services (the Division) approved the reduction of in-home supports during non-Support Camp A weeks but denied the increase of in-home supports during Support Camp A weeks.[6] N.'s mother, J. X., requested a fair hearing to challenge the Division's decision.

The evidence in this case shows that consistency in N.'s in-home supports, week to week, promotes skill development and retention, and that without a consistent 20 hours of in-home

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1 Ex. F, p.2.

2 While the POC provided in Ex. F, does not break down N.'s usage into SUPPORT CAMP A and non-SUPPORT CAMP A weeks both parties testified that previously N. had only utilized 12.75 hours of in-home supports during the 11 weeks of SUPPORT CAMP A camp, utilizing the remaining hours during non-SUPPORT CAMP A camp weeks.

3 Ex E.

4 Testimony of Ms. T.

5 Testimony of Ms. X.

6 Ex. D. *See also* Ex. G.

supports, he risks degradation in his skills. Accordingly, the Division's decision partially denying some of the requested in-home supports during the 11 Support Camp A weeks, is REVERSED. Accordingly, N. is to receive 20 hours per week of in-home supports across all weeks, as requested in his 2023-2024 POC renewal.

II. Facts

N. is 13 years old.[7] His diagnoses include autism disorder, pancreatic insufficiency, and cystic fibrosis.[8] X. is the only minor with both these diagnoses in the state.[9]

N. lives with his mother, J. X., in City A., Alaska.[10] In recent years N. has experienced a significant amount of change in his life. His parents divorced in 2022 and he has not seen his father since 2021.[11] In addition to the change in his home environment N. has experienced a change in his educational environment. Due to his heightened risk of severe infection N. was not able to attend school in-person school during the Pandemic but is now attending classes at Middle School A. in person.[12]

N. enjoys playing with brothers, camping with family, playing video games, and spending time with his puppy.[13] However, some of N.'s activities must be restricted due to his health. His lungs are very vulnerable to infection and are adversely impacted by poor air quality.[14]

N. requires inhaled medication daily to loosen the thick mucus in his lungs. Administering this medication requires a nebulizer that must be sterilized after every use.[15] He requires 40 minutes of chest physiotherapy per day.[16] In addition to the treatment required for his lungs, his body cannot digest food without pancreatic enzymes, which he must take within 45 minutes of eating and the dosage must be adjusted to food he consumes.[17]

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7 Ex. D, p. 1.
8 Letter from N.'s pediatric pulmonologist, p 2
9 Testimony of Ms. T.
10 Ex. D, p. 2.
11 Ex. E, p. 7.
12 Testimony of Ms. T.
13 Ex. E, p. 15.
14 Ex. E, p. 15.
15 Ex. F, p. 5.
16 Ex. E, p. 5.
17 Ex. E, p. 23.

The treatment of these conditions, and avoiding situations that put N.'s health at risk, is complicated by his autism.[18] More than neurotypical children, N. requires significant guidance, repetition, and consistency to obtain and maintain new skills.[19]

N.'s previous POC, valid November 11, 2022 through November 10, 2023, approved 4,784 units of in-home supports, an average of 23 hours per week.[20] That POC notes two different providers of in-home supports, with SUPPORT A incorporated providing 4,212 units and Support B incorporated providing 572 units.[21] As provided in exhibit F, that POC does not break these units of in-home supports down by week.[22] N. attends a 30 hour per week Support Camp A for 11 weeks per year: 8 weeks during the summer, two weeks during the school midwinter break, and 1 week during school spring break.[23] Testimony from both parties indicates that the in-home supports were utilized in differing amounts during Support Camp A weeks, and non-Support Camp A weeks.[24] Previously, N. utilized 12.75 hours of in-home supports during the 11 weeks of Support Camp A, and utilized the remaining hours during the 41 non-Support Camp A weeks.[25]

In October 2023, N.'s team submitted a new POC for 2023-2024 seeking a total of 4,160 units of in-home supports, or 20 hours per week.[26] The 20-hours of in-home supports across all weeks, was reached by requesting a reduction in the hours of in-home supports N. utilized during non-Support Camp A weeks, and an increase in the in-home supports he utilized during Support Camp A weeks.[27] On November 6, 2023 the Division notified N. that it had reviewed the 2023-2024 POC and approved the reduction of hours of in-home supports during non-Support Camp A weeks but denied the request to transfer those hours to Support Camp A weeks.[28] J. X. disagreed with the Division's partial denial and requested a hearing to challenge its denial.[29]

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18 Testimony of Ms. T.; *See also* Letter from W. J.
19 Letter from N.'s pediatric pulmonologist, p 2; *See also* Letter from W. J.; *See also* Testimony of Ms. T.
20 Ex. F, pp. 1-2.
21 Ex. F, pp. 1-2.
22 *See* Ex. F.
23 Ex. E, p. 22.
24 Testimony of Ms. T.; *See also* Testimony of Ms. Mattingly, *See also* Testimony of Ms. X.
25 Testimony of Ms. T.; *See also* Testimony of Ms. Mattingly, *See also* Testimony of Ms. X. *See also* Ex. G.
26 Ex E, p. 35.
27 Testimony of Ms. T., *See also* Testimony of Ms. X.
28 Ex. G. Originally the Division reduced N.'s in-home supports during SUPPORT CAMP A camp weeks to 10 hours but stipulated to 12.75 hours at the hearing and in the Division' amended notice.
29 Ex. C.

N.'s hearing was held telephonically on February 1, 2024. N. was represented by his mother, J. X. Ms. X. presented testimony from herself and O. T., N.'s Care Coordinator. Victoria Cobo-George represented the Division and presented testimony from the POC reviewer, Sandra Mattingly.

O. T. has been N's Care Coordinator for the last six years but has known N. for ten years.[30] Ms. T. testified that N. is at a pivotal age, where he is developing skills of independence in his activities of daily living and healthcare management.[31] Ms. T. testified N.'s needs don't reduce during the 11 weeks of Support Camp A, or the eight weeks of summer. Further, Ms. T. has witnessed some regression in N.'s skills during periods when he received less than 20 hours of in-home supports.[32] It was for this reason that N.'s team decided he would benefit from a more consistent schedule of support, even if that resulted in a reduction of in-home supports over the course of the year.[33]

Sandra Mattingly is a health program manager with the Division, a role she had head for two and half years.[34] She testified that she reviewed N.'s POC and after the partial denial, she staffed it with a supervisor, who made no changes.[35] Ms. Mattingly testified that the Division approves each service on a weekly basis.[36]

After the hearing the record was left open to allow Ms. X. to submit additional documentation in support of her argument. Ms. X. submitted a letter from Dr. K. K. Y., and W. J. Dr. Y. is N.'s Pediatric Pulmonologist.[37] Dr. Y. wrote that in his medical opinion "[t]he maintenance and acquisition of skills are crucial to N.'s overall health, and I am deeming it medically necessary that he be given 20 hours of in-home support per week." [38]

W. J. is N.'s special education teacher, and she holds a master's degree.[39] Ms. J.'s letter notes that even during short breaks in the school year, "N. experiences setbacks" in gaining and

30 Testimony of Ms. T.
31 Testimony of Ms. T.
32 Testimony of Ms. T.
33 Testimony of Ms. T.
34 Testimony of Ms. Mattingly.
35 Testimony of Ms. Mattingly.
36 Testimony of Ms. Mattingly.
37 Letter from N.'s pediatric pulmonologist, p 2.
38 Letter from N.'s pediatric pulmonologist, p 2.
39 Letter from W. J.

maintaining vital skills.[40] In Ms. J.'s opinion that N. receiving less in-home supports during the summer than during the school year would "likely result in N. losing valuable skills, which will in turn also adversely impact his overall progress in his Person-Centered Support Plan (PCSP) and could even negatively impact his Individual Education Plan (IEP) during the school year."[41] The Division filed a response and the record closed on March 5, 2024.

III. Discussion

A. Medicaid Home and Community-Based Waiver Services Program - Overview

1. Relevant Federal Medicaid Statutes and Regulations

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.[42] States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.[43] Congress created the waiver services program to allow states to offer long-term care, not otherwise available through Medicaid, to serve recipients in their own homes and communities instead of in nursing facilities.[44]

Federal regulations require that both mandatory *and* optional Medicaid services "be sufficient in amount, duration, and scope to reasonably achieve [their] purpose."[45] However, a state may "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures."[46]

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40 Letter from W. J.

41 Letter from W. J.

42 *See* 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) -(5), 1396a(a)(17), and 1396a(a)(21); *see also* 42 CFR 440.210 & 440.220.

43 *See* 42 USC § 1396a(a)(10)(A). The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. *See* 42 USC 1396n(c).

44 *See* 42 USC 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR 440.180, titled "Home or Community-Based Services," provides in relevant part:

> (a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . . .
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> (b) Included services. Home or community-based services may include the following services . . . (1) Case management services. (2) Homemaker services. (3) Home health aide services. (4) Personal care services. (5) Adult day health services. (6) Habilitation services. (7) Respite care services. (8) Day treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

45 42 CFR 440.230(b).

46 42 CFR 440.230(d); *see also DeLuca v. Hammons*, 927 F. Supp. 132 (S.D.N.Y.1996).

2. Relevant State Medicaid Regulations

The information which must be submitted in support of a POC renewal or amendment request, and the substantive standards for their approval, are specified by 7 AAC 130.217, which provides in relevant part as follows:

> (b) The department will approve a plan of care if the department determines that
> (1) the services specified in the plan of care are sufficient to prevent institutionalization and to maintain the recipient in the community;
> (2) each service listed on the support plan
> **(A)** is of sufficient amount, duration, and scope to meet the needs of the recipient;
> **(B)** is supported by the documentation required in this section; and
> **(C)** cannot be provided under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service under this chapter;

The specific type of waiver services at issue in this case, are defined by 7 AAC 130.265 in relevant part as follows:[47]

> (h) The department will consider residential habilitation services to be in-home support habilitation services if they are provided on a one-to-one basis to a recipient younger than 18 years of age living full-time in that recipient's private residence where an unpaid primary caregiver resides.
>
> (i) The department will pay for in-home support habilitation services under (h) of this section, subject to the following limitations:
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> (1) the department will not pay for more than 18 hours per day of in-home support habilitation services from all providers combined unless the department determines that the recipient is unable to benefit from
>
> (A) other home and community-based waiver services; or
>
> (B) services provided by family members or community supports;

Unlike some other forms of habilitative services, there is no hard regulatory cap on the amount of in-home supports N. may receive.[48]

B. Applicable Burden of Proof and Standard of Review

There was significant confusion at the beginning of this case of how to categorize the requests in the proposed POC and the Division's response to it. N.'s request to 'transfer' in-home supports from non-Support Camp A weeks to Support Camp A weeks could be viewed as

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47 7 AAC 130.265.

48 Testimony of Ms. Mattingly.

a request for an increase in services, but as the result of denying that transfer was an overall reduction in services, the denial could be viewed as a reduction. At the start of the hearing, the Division's representative, Ms. Cobo-George, resolved this dispute by conceding that for the purpose of this hearing the Division bears the burden.[49]

In a Medicaid "Fair Hearing" proceeding, the parties are allowed to introduce new evidence and testimony at the hearing.[50] In this case, significant evidence was presented before the record closed that was not available to the Division's reviewers. In a Fair Hearing the administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, even if the original decision is factually supported and has a reasonable basis in law.[51]

C. The Grounds for Denial as Framed by the Division's Notice

The grounds for denial of N.'s POC renewal are limited to those expressed in the Division's notice.[52] A fair reading of the Division's notice of adverse action reveals two asserted bases for the partial denial of the in-home supportive services during Support Camp A weeks:[53]

1. A "lack of information/documentation sufficient to demonstrate a need for a higher level of supports."

2. The amount of the approved in-home supports is sufficient in amount, scope and duration to meet N.'s needs and prevent institutionalization.

D. Did the Division Meet it Burden to Support its Partial Denial

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[49] Ms. Cobo-George's decision to accept the burden in this case only applies to this matter, and this decision makes no finding about the appropriate burden in the future.

[50] *In re F.N. OAH No.* 13-0994-MDS, (Commissioner of Health & Soc. Serv. 2013)(Available at: https://aws.state.ak.us/OAH/Decision/Display?rec=3097) .*See also 7 AAC 49.120;* 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

[51] *In Re O.P.,* OAH No. 14-1543-MDS, (Commissioner of Health & Soc. Serv. 2015) (Available at: https://aws.state.ak.us/OAH/Decision/Display?rec=2922).

[52] *In re Q.Y.*, OAH No. 16-0808-MDS*, (*Commissioner of Health & Soc. Serv. 2016) (Available at: https://aws.state.ak.us/OAH/Decision/Display?rec=3304). *See also:* Allen v. State, DHSS 203 P.3d 1155, 1169 (Alaska, 2009).

[53] Ex. G.

At the hearing, the Division's primary asserted basis for denial of the services at issue is that the approved level of support, is sufficient in amount, duration, and scope to meet N.'s needs during Support Camp A weeks. This is based on the explicit requirements of 7 AAC 130.217(b) and, if supported by the evidence, would be a legitimate basis for denial.

However, this argument is somewhat undercut by the fact that the Division also approved 20 hours of in-home supports during the non-Support Camp A weeks. So, at least during the majority of the year, the Division agrees N. requires 20 hours of in-home supports to meet his needs. At the hearing the Division argued that the nature of school and Support Camp A are fundamentally different, and that this fundamental difference justifies the disparity in in-home support hours.[54] However, Support Camp A and school are both daytime activities, of similar lengths, and N. still returns home each night. Further, the Division did not present any evidence about what the differences are between N.'s schedule during Support Camp A or his schedule during non-Support Camp A weeks.

In response, Ms. X. argued that like many children, N. requires consistency to learn and maintain skills. N.'s need for consistency is particularly acute as his autism diagnosis impacts his ability to learn and retain skills and makes repetition and consistency even more important for skill retention than it might be for neurotypical children. Further, managing his cystic fibrosis requires significant skill development, and acquiring and retaining those skills is vital to ensuring positive health outcomes.[55] Ms. X. supplemented that argument with letters from N.'s pediatric pulmonologist, Dr. K. Y., and W. J., N.'s special education teacher.

As a general rule, more weight is given to the medical opinion of a treating physician.[56] Where a treating or examining physician's opinion is not contradicted by another doctor, it may be rejected only for "clear and convincing" reasons.[57] Even when a treating or examining physician's medical opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record."[58] The Division

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54 Testimony of Ms. Mattingly.
55 Testimony of Ms. X., *See also* Letter from N.'s pediatric pulmonologist, p 2.
56 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).
57 *Id.*
58 *Id.* at 830 – 831.

argued that Dr. Y. and Ms. J.'s opinions are not controlling, and has pointed to *In re F.R.*,[59] to support the argument that professional opinions cannot be prescriptions for care.

In *In re F.R.*, the F.R.'s treating physician concluded that F.R. needed intermediate nursing services and supported that opinion by pointing to the F.R.'s need for assistance with bathing, skincare, and nailcare.[60] Bathing, skincare, and nailcare are not activities of daily living that are used to determine Waiver eligibility, and they do not meet the definition of intermediate level of care under 7 AAC 140.510. *In re F.R* holds that while the medical opinion of a treating physician is usually given considerable weight, their opinion is not controlling when it is solely addressing a regulatory requirement.

In N.'s case, Dr. Y. is not giving his opinion on if N. meets the regulatory requirements for in-home supports but his letter provides his medical opinion along with his non-medical observations of N.'s behavior. While Dr. Y.'s entire opinion may not be binding, it is very instructive. As one of N.'s primary physicians his observations indicate that consistency and repetition are vital for N.'s ability to retain skills, particularly when it comes to identifying and requesting medication. In its most relevant section Dr. Y. writes:

> In order to effectively gain and maintain these skills, N. requires significant repetition and consistency. With only half the hours allotted during the summertime,[61] this will prove to be detrimental to N.'s overall maintenance of his skills as well as his capacity to gain new skills, especially given that the new goals are challenging. As N.'s pulmonologist, I am confident that N. can master these skills, but he absolutely requires greater frequency and consistency than what is being given in the future. The maintenance and acquisition of skills are crucial to N.'s overall health, and I am deeming it medically necessary that he be given 20 hours of in-home support per week.[62]

However, the standard for approving in-home supports in a POC is not medical necessity, but if the in-home supports are provided in a "sufficient amount, duration, and scope to meet the needs of the recipient". Addressing the "needs of the recipient" is necessarily more expansive question than pure medical need as POCs are designed not just to serve the medical needs of the recipient, but also to prevent institutionalization and to maintain the recipient in the community.

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[59] *In re F.R.,* OAH 15-0878-MDS (Commissioner of Health and Soc. Serv 2015).

[60] *In re F.R.,* OAH 15-0878-MDS, p. 4. (Commissioner of Health and Soc. Serv 2015).

[61] The initial denial set 10 hours of in-home supports during SUPPORT CAMP A camp, half the amount during the remainder of the year, this was later amended to 12.75 hours.

[62] Letter from N.'s pediatric pulmonologist, p 2.

Dr. Y.'s letter is corroborated by W. J., N.'s special education teacher. Unlike the portion of Dr. Y.'s letter that addresses N.'s medical needs, Ms. J.'s opinion is not entitled to the same amount of weight, but it is still an instructive account from a professional familiar with N.'s needs. As an educator with a master's in special education, and hands on experience with N., Ms. J. is well placed to evaluate N.'s needs.

Ms. J.'s letter notes that even during short breaks in the school year, "N. experiences setbacks" in gaining and maintaining vital skills.[63] In Ms. J.'s opinion that a reduction in N.'s in-home supports during Support Camp A weeks would "likely result in N. losing valuable skills, which will in turn also adversely impact his overall progress in his Person-Centered Support Plan (PCSP) and could even negatively impact his Individual Education Plan (IEP) during the school year."[64]

The Division argues that in-home supports cannot be used to replace, supplement, or supplant school.[65] The Division is certainly correct, that using these hours to replace school would be inappropriate. If the POC requested more hours of in-home supports during Support Camp A than N. received during school weeks, or N.'s goals changed during camp weeks, this would be a powerful argument for denial. However, the POC does not request an increase over the hours the Division has already determined are necessary during the school year, and N.'s goals remain consistent throughout the year. If 20 hours of in-home supports are appropriate during the school year, it cannot be said that 20 hours are replacing or supplementing school during Support Camp A.

There was significant debate at the hearing on the appropriate way to review a POC. Primarily, the question boils down to if the hours for a particular service should be examined and approved on a week-by-week basis, or if the POC should be evaluated based on the yearly total number of hours for that service. The Division points to 7 AAC 130.217(b)(2)(A), which holds that the Division must review "each service listed on the support plan" and determine if it, "is of sufficient amount, duration, and scope to meet the needs of the recipient." While there are multiple decisions which discuss the need for the Division to make this review when different

63 Letter from W. J.
64 Letter from W. J.
65 Division's Response to Supplemental Exhibits.

services are requested on different weeks, there is not a published decision holding that the Division must determine if the level of the *same service* is appropriate from week to week.

However, it is not necessary to determine which approach is correct to reach a decision in this matter. Even if the Division's approach is correct, the letters from Dr. Y. and Ms. J., and the evidence presented at the hearing, provide sufficient to support the conclusion that 20 hours of in-home supports that the parties agree are necessary to meet N.'s needs during non-Support Camp A weeks, are also necessary to meet N.'s needs during the Support Camp A weeks.

IV. Conclusion

While the Division did not have all the evidence in this case at the time it partially denied the POC, the additional information obtained through the hearing process demonstrates, by a preponderance of the evidence, that 20 hours of in-home supports are necessary. Accordingly, the Division's denial of that portion of N.'s proposed POC, which requested 20 hours of in-home support services, during Support Camp A weeks, is reversed.

Dated: March 29, 2024

SIGNED
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 12th day of April, 2024.

By: SIGNED
Name: Eric M. Salinger
Title: Administrative Law Judge

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