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

In the Matter of	)	
	)	
C. X.	)	OAH No. 24-0158-MDS
	)	

DECISION

I. Introduction

On February 22, 2024, the Department of Health's Division of Senior and Disabilities Services (the "Division") issued a determination that C. X. did not meet the criteria for a "person with a developmental disability" set out in Alaska Statue 47.80.900(6). This determination left C. ineligible to seek benefits under the Medicaid Home and Community Based Waiver Program in the Intellectual and Development Disability ("IDD") category.[1] J. X., C.'s mother and legal guardian, requested a hearing on his behalf to challenge the Division's determination. That hearing was held on May 9, 2024. Ms. X. represented C.'s interests and testified on his behalf, as did C.'s care coordinator, F. F. Victoria Cobo-George, a Division Fair Hearing Representative, represented the Division. Health Program Manager Heather Chord testified for the Division.

While the evidence shows that C. has severe problems with self-direction, and lesser struggles with two other life activities (self-care, and receptive and expressive language), from an overall perspective his conditions are not severe enough for him to meet the statutory criteria for a "person with a developmental disability." Consequently, the Division's denial of C.'s development disability determination is AFFIRMED.

II. Legal Background

The IDD Waiver program permits families with children who meet certain disability eligibility requirements to qualify for Medicaid even if they are otherwise over the normal income limit for participation in Medicaid. Qualifying children are those who receive at-home medical care similar to that provided at a medical institution.[2]

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[1] 7 AAC 130.206(a). This determination also impacted C.'s ability to seek benefits under the Individualized Supports Waiver. *See* 7 AAC 130.206(a)(1).

[2] 42 C.F.R. § 435.225.

Obtaining an IDD Waiver is a multistep process that begins with submittal of an application for a "Developmental Disability Determination."[3] The goal of this application process is to provide the Division with information and medical records from which it can assess whether a child qualifies as a "person with a developmental disability" under the following definition set out in AS 47.80.900(6):

> [A] "person with a developmental disability" means a person who is experiencing a severe, chronic disability that
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> (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
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> (B) is manifested before the person attains age 22;
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> (C) is likely to continue indefinitely;
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> (D) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and
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> (E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated[.]

For minors under the age of 16 years, life activities of independent living and economic self-sufficiency are not evaluated. Thus, the life activities for which C. was evaluated were (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; and (5) self-direction,

A child found to be a "person with a developmental disability" under these criteria becomes eligible for placement on the waiting list for services under the IDD Waiver program.[4] This determination also makes a child eligible to seek certain categories of services under the Individualized Supports Waiver program.[5]

When making determinations under this statute, the Division's policies and procedures provide that a "substantial function limitation" is indicated by a delay of 25 percent, 2 standard deviations, or functioning at or below the 2nd percentile.[6]

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[3] 7 AAC 130.207(a)(2)(A). The application form is available online at: https://health.alaska.gov/dsds/Documents/SDSforms/idd/IDD-01-DeterminationApplication.pdf.

[4] 7 AAC 130.206(a).

[5] The value of services available under Individualized Supports Waiver is subject to an inflation adjusted cap of $17,500. *See* 7 AAC 130.206(a)(1). There is no comparable cap on the value of benefits available under the IDD Waiver program.

[6] While the Division makes frequent reference to this standard here, it does so without actually indicating where it is derived from. *See, e.g.*, Exhibit D at p. 7. However, in several past decisions addressing eligibility under the Medicaid TEFRA program, reference is made to this standard being included in the Division's Policy and Procedures Manual. *See In re K D,* OAH No. 14-2301-MDX (Comm. Health & Soc. Servs. 2015) (accessible at

III. Facts

C. is currently 9 years old and has been diagnosed with an autistic disorder, with secondary diagnoses of ADHD and anxiety. As described in an assessment performed by an occupational therapist in December 2023, C. suffers from "significant deficits with his performance skills in addition to difficulties with sensory processing, rigid thinking and emotional dysregulation."[7] Based in large part on this assessment, Ms. X. sought a Developmental Disability Determination ("DDD") on C.'s behalf.

On December 13, 2023, a Division employee issued a notice advising that C.'s request for a DDD was being denied. In the view of the Division's assessor, self-direction was the only major life activity set out in AS 47.80.900(6) where C. had a substantial functional limitation.[8] This denial was subsequently reviewed by Ms. Chord after Ms. X. submitted over 200 pages of additional medical and school records in support of C.'s determination request.[9] Even with this additional information, however, Ms. Chord reached the identical conclusion that C. has a substantial functional limitation in only one area, that being self-direction. While noting that the additional information provided by Ms. X. demonstrated that C. faces challenges with two other life activities – self-care, and receptive and expressive language – Ms. Chord concluded those were not severe enough to support findings of a substantial functional limitation.[10] Ms. X. timely appealed this determination on March 13, 2024.[11]

IV. Discussion

A. Preliminary Matters

The scope of review here is limited to assessing whether applicable laws and policies were properly applied based on the facts that existed when the denial decision was made.[12] Since C. is pursuing a DDD in order to obtain Waiver benefits, he has the burden of proving by a preponderance of the evidence that the Division erred in its determination.[13]

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https://aws.state.ak.us/OAH/Decision/Display?rec=3368), and *In re J B*, OAH No. 16-0320-MDX (Comm. Health & Soc. Servs. 2015) (accessible at https://aws.state.ak.us/OAH/Decision/Display?rec=3369).

7 Exhibit E at p. 1.

8 Exhibit D at pp. 7-10.

9 These are records are found in Exhibit E.

10 Exhibit D at pp. 1-4.

11 Exhibit C.

12 7 AAC 49.170

13 7 AAC 49.135.

B. Contested Issues

The Division's determination that C. does not face substantial functional limitations in the life activities of learning, and mobility are not being challenged here. Nor is there any contention that the Division erred in its assessment that C. has a substantial functional limitation in the area of self-direction. The extent to which the Division was mistaken in its assessment of the other major life activities at issue here – self-care, and receptive/expressive language – will be covered below.

C. The Division correctly determined that C. does not have a substantial functional limitation in the area of receptive and expressive language.

As Ms. Chord explained during her hearing testimony, the term "receptive language" refers to a person's ability to comprehend spoken or written language. An example of receptive language is a child putting on his coat after being instructed to do so by a teacher or parent. "Expressive language" is the ability to express wants and needs through verbal and nonverbal communication. A child asking a parent for a drink of water is an example of expressive language.

The record here offers substantial information showing that C. can process written and spoken language that is directed towards him and is able to express his wants and needs in return. The leading evidence for this is a report regarding a neuropsychological assessment of C. that was issued in January 2023.[14] As noted in that report:

> C.'s neuropsychological profile highlighted solidly developed cognitive abilities. His verbal and nonverbal skills were within age expectations …. C. often offered reasoning for all his answers throughout the evaluation. He constantly questioned the clinician if his response was correct. Furthermore, teachers report that he is often nervous about task completion and worries if others complete a task before him.[15]

The report goes on to detail the standardized tests that were administered to C., the results of which showed that he had an average score for expressive speech and an above average score on a test designed to measure comprehension of instruction.[16] A similar conclusion is echoed in a more recent letter from a speech language pathologist that has worked with C. for over two

[14] Exhibit E at pp. 95 – 110.
[15] Exhibit E at pp. 96 – 97.
[16] Exhibit E at pp. 104 – 105.

years, who notes that his "receptive and expressive abilities in standardized tests show adequate skills."[17]

This is not to say that C. does not face serious communication challenges. As is often the case for autistic children, C. struggles with aspects of verbal communication referred to as "pragmatic language." This term covers the more subtle aspects of social communication such as humor, sarcasm, and the linkage of gestures and facial expressions with spoken language. As C.'s speech pathologist commented:

> C. has significant deficits in the area of social pragmatic communication which impacts his ability to interpret and react to social situations around him…. C. is not yet able to consistently interpret a social situation and respond with expected behaviors independently. Rather he often responds with insensitivity to others' ideas or feelings which makes interacting with peers very challenging for him.

While it is clear that C.'s pragmatic speech is significantly delayed as compared to his same-age peers, AS 47.80.900(6) speaks only to receptive and expressive language. Even if pragmatic language is given some weight as a contributing component to receptive and expressive language – which is the approach the Division took here[18] – the challenges C. has communicating in social settings cannot supplant the standardized test results reported by two different professionals which show that C.'s expressive and receptive speech are roughly average as compared to his peers.

Accordingly, the Division's determination that C. does not have a substantial functional limitation in the area of receptive and expressive speech must be affirmed.

D. The Division correctly determined that C. does not have a substantial functional limitation in the area of self-care.

The evidence is largely uncontradicted that C. is able to perform the most vital activities of daily life – such as eating, bathing, and toileting – at a level that is average to below average for his peer group.[19] Additionally, the Division points to results which showed that C. was not at or below the 2nd percentile on any of the component parts of the "Adaptive Behavior Adaptive

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[17] Exhibit E at p. 242. While this letter is undated, Ms. X. indicated in her testimony that it was written in the latter months of 2023 for the purpose of supporting C.'s DDD.

[18] Exhibit D at p. 2. Given the legislature's presumably deliberate choice to not reference pragmatic speech in AS 47.80.900(6), the Division lacks the authority to independently elevate pragmatic speech to the same level as expressive and receptive speech when performing developmental disability determinations.

[19] Exhibit E at p. 5 (occupational therapist report dated 10/23/23); and p. 134 (occupational therapy progress notes dated 8/24/2022).

System," a standardized test which measures daily life skills for persons with disabilities or developmental delays.[20]

While Ms. Chord conceded during her testimony that C. is below average as compared to his peer group for many self-care tasks, she emphasized during her testimony that the standard being applied by the Division – at or below the 2nd percentile – requires evidence of deficits that are far below average. Ms. Chord also cautioned that evidence of C. struggling with certain discrete self-care activities (such as managing buttons or zippers while dressing himself or tying his shoes) does not compel a finding of a substantial functional limitation for the entirety of that activity. Instead, the Division's analysis was based on the approach that "[s]ubstantial functional limitations must be demonstrated globally in areas of major life activity."[21]

Substantial evidence of C.'s struggles with a variety of self-care activities was provided through the written reports and testimony of Occupational Therapist K. U., who summarized C.'s self-care abilities as follows:

> Patient is able to appropriately chew and swallow with 100% independence, able to lift food and drink to mouth with 100% independence, able to anticipate the need to utilize toilet with 75% independence, ability to utilize toilet facilities for avoiding 75% independence, ability to select and don attire 75% independence, ability to wash self in shower or tub 50% thoroughness, ability to shampoo and rinse hair 25% thoroughness, Ability to perform oral hygiene routine 50% independence, hair maintenance 75% independence.[22]

In her testimony, Ms. U. explained that C. struggles with fine motor control, which makes it difficult for him to manage tasks such as tying his shoes, dressing himself in clothing that has zippers or buttons, brushing his teeth, or cutting his own food while eating. In all of these tasks Ms. U. regarded C. as having a delay greater than 25% as compared to his peers.

Ms. X. also testified to the struggles C. has with many self-care tasks, and the corresponding difficulties she has in trying to help him bathe and dress. In addition to the challenges C. faces with fine motor skills referenced above, Ms. X. spoke in detail regarding C.'s inability to perform self-care tasks such as bathing himself or putting his clothes on correctly.

While C. is clearly below average as compared to his peers in an array of self-care activities, from a broader perspective the facts presented here fail to show that Division was

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20 Exhibit E at p. 108.
21 Exhibit D at p. 1.
22 Exhibit E at pp. 4 – 5.

mistaken in concluding that C. has a substantial functional limitation in the area of self-care. The fact that C. is largely independent in sleeping, feeding himself and using the bathroom are of particular significance here.[23] While C. is arguably well below average when it comes to dressing and bathing himself, in a context where C. carries the burden of proof this evidence is not enough to demonstrate a substantial functional limitation in the area of self-care.

V. Conclusion

Though is clear that C. faces significant challenges with pragmatic speech, there is ample evidence showing that the Division did not err when it concluded that he does not have a substantial functional impairment in the major life activity of expressive and receptive speech. While a much closer question is presented regarding self-care, the evidence fails to demonstrate that the Division erred in determining that C. does not have a substantial functional impairment with this major life activity. Accordingly, the Division's determination that C. is not a person with a developmental disability as that term is defined by AS 47.80.900(6) is AFFIRMED.

Dated: May 22, 2024

SIGNED
Max Garner
Administrative Law Judge

[23] In this regard, a careful review of C.'s school records (which comprised over 100 pages of the agency record) did not disclose any references to him requiring assistance with toileting or eating.

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 2nd day of July, 2024.

By: SIGNED
Name: Daniel R. Phelps
Title: Process Improvement Manager

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