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

In the Matter of	)	
	)	
L. O.	)	OAH No. 23-0507-MDS
	)	

DECISION

I. Introduction

L. O. is a Medicaid Home and Community-Based Waiver recipient, who is severely disabled and resides in a group home. On April 14, 2023, she requested that her Waiver Support Plan of Care be amended to include an acuity payment rate. After requesting and receiving supplemental information from Ms. O.'s care planning team, the Division of Senior and Disabilities Services (Division) denied the acuity payment rate request on August 8, 2023. Ms. O. requested a hearing to challenge the denial.

Ms. O.'s hearing was held on August 29 and 30, 2023 by video. Ms. O. attended passively. She was represented by J. N., her mother and court-appointed guardian, who also testified on her behalf. K. O., her father, also testified for her, as did J. B. with GROUP HOME A., Inc., the director of operations for the group home where Ms. O. resides. Christine Culliton, Ms. O.'s Medicaid Care Coordinator, also participated in the hearing. The Division was represented by Victoria Cobo-George, one of its Fair Hearing representatives. The Division's witnesses were Tammy Smith, Lauren Scarmuzzi, Denise Busby, and Jerry Fromm, all of whom are Health Program Managers with the Division who participated in reviewing Ms. O.'s amendment request. The record was held open until September 15, 2023 for the parties to complete supplemental briefing.

The evidence presented in this case demonstrated that Ms. O. did not meet her burden of proof to establish that she qualifies for an acuity payment rate. This is for two separate and independent reasons. First, the acuity payment regulation requires specific supporting documentation as part of the application, which were not provided in this case. Second, Ms. O. did not demonstrate that she requires dedicated care 24 hours per day, seven days per week. Accordingly, the denial of her amendment request for an acuity payment rate is AFFIRMED.

II. Facts

Ms. O. is currently 19 years old. She is severely disabled. To quote from her physician's letter of August 18, 2023:

> She has a very complex medical history, including but not limited to mixed-type quadriplegic cerebral palsy with wheelchair dependence, history of congenital CMV, hydrocephalus with VP shunt, symptomatic difficult to control epilepsy, and G-tube dependency. Due to her complex medical needs, she is completely dependent on others for her care 24/7. She cannot complete any activities of daily living, and depends on others for her tube feeds, suctioning of oral secretions, hygiene, and management of elimination. She needs all of her medications managed and administered by others. She also requires PT/OT and daily range of motion exercises due to her quadriplegia and wheelchair dependence.
>
> Due to her high needs, she has always required one-on-one support. If she does not have this level of care within the community and her home setting, she is at risk of immediate institutionalization in a skilled nursing facility.[1]

Ms. O. is also legally blind and has a diagnosis of unspecified convulsions.[2] She is non-verbal but can vocalize.[3] She is currently attending high school in the School District A Transition Program, with an anticipated end date of December 13, 2023.[4]

Ms. O. was living at her mother's home until November of 2022. Because of her very intensive physical care needs and her mother's own medical conditions which rendered her unable to care for her any longer at home, she moved to a group home.[5] In the spring of 2023, she was receiving residential habilitation services – group home, day habilitation services, and nursing oversight and care management services through her approved Medicaid Waiver approved plan of care.[6] On April 14, 2023, she filed a request that her Medicaid Waiver plan of care be amended to provide her with an acuity payment rate effective March 15, 2023.[7]

Ms. O.'s team provided several 24-hour care logs and check lists with the original application.[8] The 24-hour care logs are not signed but do contain typed information regarding the caregivers and the typed initials of the caregiver. The first day of those 24-hour care logs is undated. It states that she is monitored due to her "ongoing seizure activity." However, the

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1 August 18, 203 Letter from Kyleen Luhrs, MD, filed on August 30, 2023.
2 "l.'s diagnosis and medication" document filed on August 30, 2023.
3 Ex. F, p. 80.
4 *See* School District Evaluation Summary and Eligibility Report and Individualized Education Program. Ex. F, pp. 62 – 83.
5 Ex. D, p. 26.
6 Ex. G.
7 Ex. E, pp. 28 – 29.
8 Busby and Smith testimony.

entries between 12:00 a.m. and 12:30 a.m. state that staff "check[s]" on her. The entry for 1:00 a.m. to 1:15 a.m. reads that she "can often yell and moan when she is having a seizure. This alerts staff to be right there." The entry for 1:30 a.m. – 1:45 a.m. reads that "it is extremely important for staff to check in with" her. The entries for 2:15 – 2:45 a.m. again refer to staffing checking in. The entry for 2:45 a.m. – 3:00 a.m. reads that "Staff enter[s] [her] room." The entries for 3:00 a.m. – 3:30 a.m. show staff checking in. The entry for 4:00 a.m. – 4:15 a.m. provides that staff heard her struggle and moan and state that "Staff rushes into [her] room." The entry for 5:00 to 5:15 a.m. states that "Staff is in [her] room when again [she\ suffers another Seizure." The entries for 5:45 – 6:00 a.m. The log then provides that she is asleep by 7:30 p.m. The entries for 7:30 to 8:30 p.m. read identically that "[i]t is required that staff continue to visually check on [her] for her safety and wellbeing."[9]

The 24-hour care log provided for January 21, 2023 states that Ms. O. was monitored and her seizures were timed during her sleeping hours. It also states that between 8:45 – 9:00 a.m., her "two food bottles for her school day" were prepared, and "her afternoon medication is in her backpack for the school staff." The remainder of her entries for that day show care by staff but do not show her leaving to go to school.[10] January 21, 2023 was a Saturday, not a school day.

The next 24-hour care log is for January 23, 2023. It reads that "staff monitor and check in every fifteen minutes" for the entries between 12:00 a.m. and 7:00 a.m., and that between 7:00 a.m. and 7:15 a.m., "Staff comes into bedroom" to wake her. This was a school day, and the log reads that she is waiting for the school bus between 9:00 a.m. and 9:15 a.m., and that the school bus returned between 3:30 p.m. – 3:45 p.m. The log shows that she went to sleep shortly after 8:00 p.m. on, the staff "check[s]" on her between 9:00 p.m. and 11:00 p.m., "staff monitor and check in every fifteen minutes to monitor seizure activity," and her head is repositioned every half-hour.[11]

The record also contains check list forms, not full 24-hour care logs, for one to two "check ins" each day for January 9, 10, 11, 13, 14, 15, 17, 18, 26, and 28. The typed heading on the top of the form reads "L. O. Staff Support & check In's every 15 min. during the day & every

9 Ex. F, pp. 1 – 17.
10 Ex. F, pp. 18 – 26.
11 Ex. F, pp. 27 – 46.

2 hrs while she is in bed." These check lists were filled in by hand, with a handwritten name on the top of each page.[12]

After Ms. O.'s initial amendment request was filed, the Division was provided "Therap Notes," which were created by Ms. B. for GROUP HOME A., Ms. O.'s service provider, on May 24, 2023.[13] Those notes were for January 1, 2023 through May 23, 2023, and may have only one entry per day. They are not signed or initialed[14] The notes were provided in a disjointed format. For instance, the initial entry for January 1, 2023, simply indicates that 24 hours of Assisted Living services were provided on January 1, 2023, with no narrative provided.[15] A undated narrative summary statement provided later in the filed documents, which appears to be a continuation of the entry for January 1, 2023, states that Ms. O. was having nighttime seizures, and "staff would have to go check on her."[16] Similarly, the narrative entries on the next page in the record, which presumably correspond to the entries for January 2 and 3, 2023, indicate that staff calmed her down and reassured her after she had nighttime seizures, and that she was checked on during the night.[17] The narrative summaries consistently refer to Ms. O. being checked on, being comforted/reassured after seizures, and having to have her briefs changed due to nighttime incontinence.[18] Some of the narrative statements provide that she was checked every hour or two hours.[19] Another entry provided that after she had several seizures, that staff stayed with her "until she went back to sleep."[20]

A log recording Ms. O.'s seizure activity from November 20, 2022 through February 1, 2023 was also provided. That log shows that Ms. O. experiences frequent short seizures, which often include multiple seizures on the same day. The duration ranges from five seconds to one minute, although the overwhelming majority are for under 20 seconds.[21] A one-minute seizure on December 31, 2022 appear to be an outlier.[22]

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12 Ex. F, pp. 52 – 61.
13 Smith testimony.
14 Ex. F, pp. 84 – 421.
15 Ex. F, p. 84.
16 Ex. F, p. 253.
17 Ex. F, p. 85, 254.
18 *See e.g.*, Ex. F, p. 255, 260, 267.
19 *See e.g.,* Ex. F, pp. 366, 369, 371 -372.
20 Ex. F, p. 371.
21 Ex. F, pp.440 – 456.
22 There are two separate entries at 4:50 (presumably p.m.) on 12/31 for one minute apiece. Ex. F, p. 445.

On August 22, 2023, Ms. O. filed "Clinician Reports" for May 1, 2023 through July 31, 2023.[23] They contain the name of a service provider, but not a signature or initial of any type, and they cover blocks of time rather than 15-minute increments. For example, there are three entries for May 1, 2023, covering 12:00 a.m. to 9:00 a.m., 3:00 p.m. to 6:00 p.m., and 6:00 p.m. to 11:59 p.m. The entry for May 1 from 12:00 a.m. to 9:00 a.m., states that staff checked on her hourly. She did have multiple seizures, and the entry for 6:00 p.m. until 11:59 p.m. indicates that staff comforted her.[24] As with other care records, these notes indicate that she was checked: e.g., on May 5, 2023, "[t]hroughout the night [Ms. O.] was having seizures and staff would have to go check on her."[25]

Ms. O.'s medications include one for rectal diazepam which is to be administered if she has seizures that last over four minutes or has more than three seizures within a 60 minute period.[26] As of June 6, 2023, she had not had that medication administered in over one year.[27] Hospital A. records indicate that as of March 17, 2023, her seizure intensity and duration were decreasing.[28] Hospital B. medical records from June 2, 2023, notes that she has "6-10 seizures daily; more often at night. Most last less than 30 seconds and don't require any intervention."[29]

Ms. O. had a vagus nerve stimulator (VNS) implanted in early June 2023. The purpose of that device is to help to control her seizures. It was not activated until August 22, 2023.[30] Ms. O.'s parents both testified that once the VNS is fully turned on, it will require someone with Ms. O. constantly so that they can hold a magnet over the VNS for seizure control.[31]

Ms. O. attended the hearing passively by video, where it was possible to see her. She was in a hospital bed and observed to be completely unable to care for herself. She was non-verbal, observed to move slightly, and occasionally vocalize and make facial expressions.

Jerry Fromm is a Division employee who participated in reviewing Ms. O.'s acuity payment rate request. He has an extensive background in hospital nursing. He testified that based upon his experience and his review of Ms. O.'s medical records, that she did not require a

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23 *See* document marked "L. O. Notes May 1 through July 31, 2023" filed on August 22, 2023.
24 "L. O. Notes May 1 through July 31, 2023" p. 1.
25 "L. O. Notes May 1 through July 31, 2023" p. 3. *Also see* entry for May 7, 14, 15, 20, 2023, stating staff would check on her. "L. O. Notes May 1 through July 31, 2023" pp. 3, 6, 7.
26 *See* "Additional Records" pdf filed on August 30, 2023, p. 226.
27 *See* "Additional Records" pdf filed on August 30, 2023, p. 209.
28 *See* "Additional Records" pdf filed on August 30, 2023, p. 176.
29 *See* "Additional Records" pdf filed on August 30, 2023, p. 224.
30 *See* "Neurology Provider Clinic Notes" dated August 22, 2023, filed on August 30, 2023.
31 N. testimony; O. testimony.

dedicated care provider, and if she was admitted to a hospital, she would not be assigned a dedicated nurse. Instead, if she was in a pediatric unit, she would be part of a four-person per nurse caseload; if in an adult unit, she would be part of six-person per nurse caseload.[32]

III. Discussion

The issue in this case is whether Ms. O. qualifies for an acuity payment rate as part of her Medicaid Waiver Plan of Care. Because this is a new service requested by Ms. O., she has the burden of proof by a preponderance of the evidence.[33]

Particularly high-needs waiver recipients such as Ms. O., who are receiving group home habilitation services, may also qualify to receive an additional "acuity payment rate," which is paid to the provider.[34] To qualify for an acuity payment rate, they must, "because of the recipient's physical condition or behavior," need "direct one-to-one support from direct care workers whose time is dedicated solely to providing [those] services. . . to that one recipient 24 hours per day, seven days per week."[35] The request for an acuity payment rate must be supported by documentation establishing the need for this extra level of support.[36]

In reviewing Ms. O.'s case, there are two separate questions that must be addressed. The first is whether Ms. O. complied with the regulatory requirement that she provide the necessary documentation to support her request. The second is whether the evidence in this case shows that she requires dedicated one-on-one support 24 hours per day, seven- days per week. Each of these questions must be answered affirmatively for her to prevail.[37]

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A. Documentation Requirements

Alaska Medicaid regulation 7 AAC 130.267, governs the granting of an acuity payment rate. It requires, in relevant part, that the applicant provide "a copy of the recipient's clinical record under 7 AAC 105.230(d)(6) documenting 24 hours of activity for each of the 30 days immediately preceding the

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32 Fromm testimony.
33 7 AAC 49.135.
34 7 AAC 130.267(a).
35 7 AAC 130.267(b)(2).
36 7 AAC 130.267.
37 Ms. O. raised the point that she is a Tribal member and subject to Tribal Medicaid Administrative Claiming. *See* "Tribal Medicaid Administrative Claiming" page on the Department of Health's Division of Health Care Services webpage, filed by Ms. O. on August 30, 2023. However, no evidence or legal authority was presented that this somehow amends or alters the Alaska Medicaid regulations which govern this case was presented. Accordingly, this point will not be addressed further.

date of the request."[38] 7 AAC 105.230(d)(6) then sets out the requirement that the records be dated, signed or initialed "annotated case notes identifying each service or supply delivered." When read together, these two regulations require that an applicant for an acuity payment rate provide annotated, signed/initialed, and dated records documenting 24-hour care for the applicant for each of the 30 days immediately preceding the date of the application.

The evidence indisputably shows that Ms. O.'s initial amendment request filing did not include 30 days of records. However, evidence also shows that the Division continued to accept filings in this case up to the date of the denial. Those filings consist of the 24-hour care logs and "check lists" for part of January 2023, and the Therap Notes for January 1 through May 23, 2023. The January 24-hour care logs and check lists do not satisfy the regulatory requirement that records be produced for the 30 days preceding the amendment request, given that the amendment request was made in April 2023 for an effective date of March 15, 2023. While the Therap Notes provided for January 1 through May 23, 2023 do encompass the relevant time periods, they are not initialed or signed as required by regulation. Accordingly, the clinical records filed with the Division prior to its August 8, 2023 denial do not satisfy the regulatory requirements required for an applicant for an acuity payment rate.

The "Clinician Reports" for May 1, 2023 through July 31, 2023, filed by Ms. O. on August 22, 2023[39], also do not satisfy the regulatory requirements for several independent reasons: first, they contain the name of a service provider, but not a signature or initial of any type; second, they do not cover the 30 day time period preceding the amendment request; and third, they were supplied, not as part of the amendment request process, but after the denial.

In a prior case involving the request for an acuity payment rate, the Commissioner expressed a firm position regarding compliance with the regulatory requirement to provide supporting documentation. In that case, the administrative law judge issued a proposed decision finding that the Medicaid recipient should receive an acuity payment rate despite insufficient supporting documentation. The Commissioner declined to adopt the proposed decision and denied an acuity payment rate, stating:

> There is a high standard established by regulation for approval of this service. Services may be approved if the department determines it is necessary based on an

[38] 7 AAC 130.267(d)(3). It should be noted that while the regulation, 7 AAC 130.267(d), also recites other documentation requirements, the emphasis in the Division's August 8, 2023 denial letter (Ex. D, pp. 1 – 7), is on the 30-day clinical record requirement. Accordingly, the other documentation requirements will not be addressed.

[39] *See* document marked "L. O. Notes May 1 through July 31, 2023" filed on August 22, 2023.

> evaluation of the supporting documentation submitted in accordance with 7 AAC 130.267. The documentation required to be submitted under the regulation is clear. . . .[40]

As discussed in detail above, Ms. O. had the burden of proof to show that she supplied the necessary documentation prior to the denial of her amendment request. She did not meet that burden.

B. Dedicated One-on-one Support 24 Hours per Day, Seven-days per Week.

The critical issue here is whether Ms. O. satisfies the strict requirements of the Acuity services regulation. Does she "because of [her] physical condition or behavior," need "direct one-to-one support from direct care workers whose time is dedicated solely to providing [those] services ... to that one recipient 24 hours per day, seven days per week"?[41]

Ms. O. has extreme health conditions resulting in exceedingly high care needs. However, there are no medical records which show she is at risk of hospitalization if not someone dedicated exclusively to her care is not continuously in attendance. The evidence shows that while she has frequent and unpredictable seizures, her seizures are minor, and the care provided when she has a seizure is quite limited: her providers calm her and reassure her and change her incontinence products as necessary, but there is no evidence that more significant intervention is needed. Moreover, her June 6, 2023 medical records indicate that she has a prescription for rectal diazepam in the event of severe seizures or a cluster of seizures, but that medication had not been administered in over a year. This shows that her seizures are not life-threatening and do not require round-the-clock care to ensure her health and safety. While she did have a VNS installed to try and control or reduce her seizure activity, there is no evidence that its installation or activation require a continuous dedicated attendant to avert immediate hospitalization or a life-threatening condition.

In contrast, the cases where an acuity payment rate have been authorized to date are those where a recipient requires a dedicated one-on-one caregiver 24 hours per day seven days per week to prevent a foreseeable immediate health or safety risk.[42] It should also be noted that the care logs/Therap Notes information provided by Ms. O. do not indicate that she receives continuous dedicated care. As discussed in the statement of facts above, there are multiple references to staff going into her room, staff checking on her – sometimes even at two-hour intervals, i.e., those documents do not show that someone is continuously present with her. As a result, Ms. O. did not meet her burden of proof to establish that

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[40] *In the Matter of T W*, OAH Case No. 16-0809 (Commissioner Dept. of Health, January 21, 2017). This decision is available online at https://aws.state.ak.us/OAH/Decision/Display?rec=2822.

[41] 7 AAC 130.267(b)(2).

[42] *See, e.g., In the Matter of C U*, OAH Case No. 19-0252 (OAH 2019). This decision is available online at https://aws.state.ak.us/OAH/Decision/Display?rec=6525.

she meets the exceedingly high regulatory criteria to qualify for an acuity payment rate. Mr. Fromm's testimony that even if she was hospitalized, she would not have staff dedicated solely to her care, supports this conclusion. This conclusion is not altered by the fact that Ms. O. now has a VNS, which will require monitoring, because it is a short-term need and does not implicate a need for 24-hour care due to a foreseeable immediate health or safety risk.

An issue was also raised at hearing, which was whether the fact that Ms. O. is currently attending school parttime, where the school district provides her care, not her Medicaid provider group home, would render her ineligible for an acuity payment rate. It would only be necessary to resolve this issue if she otherwise qualified for the acuity payment rate. As discussed above, she does not otherwise qualify to the acuity payment rate. It is therefore not necessary to address this issue.

IV. Conclusion

Ms. O. had the burden of proof in this case by a preponderance of the evidence to establish that she qualified for an acuity payment rate. As discussed above, she does not satisfy the very high threshold to qualify for an acuity payment rate. As result, the Division's denial is AFFIRMED.

Dated: November 9, 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 5th day of December, 2023.

By: *Signed*
Name: Daniel R. Phelps II
Title: Project Coordinator, Department of Health
Final decision maker by Delegation of the
Commissioner of Health

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