THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Health and Social Services

Governor's Council on Disabilities & Special Education

3601 C Street, Suite 740
Anchorage, Alaska 99503
Main: 907.269.8990
Fax: 907.269.8995

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Kurt West
Department of Health and Social Services
350 Main St., Suite 425
Juneau, AK 99801

RE: Comments on the proposed changes to the Medicaid home and community-based waiver regulations regarding Day Habilitation service hours

Dear Mr. West:

The Governor's Council on Disabilities and Special Education (the Council) fills a variety of federal and state roles, including serving as the State Council on Developmental Disabilities (SCDD) under the Developmental Disabilities Assistance and Bill of Rights Act. As the SCDD, the Council works with Senior and Disabilities Services (SDS) and other state agencies to ensure that people with developmental disabilities and their families receive the services and supports they need, as well as participate in the planning and design of those services. One of the duties of the SCDD is providing comments on proposed regulations. The Developmental Disabilities (DD) Committee is a standing committee of the Council and is responsible for the day to day work to create change that improves the lives of people with developmental disabilities and their families. The Medicaid Ad Hoc Committee was established by the Council to review and comment, in conjunction with the DD Committee, on proposed changes to Medicaid regulations and policies when they are released for public comment.

We appreciate the opportunity to comment on the proposed changes to the Medicaid home and community-based waiver regulations on Day Habilitation. The Council's comments are as follows:

Day Habilitation Service Amendments

The proposed amendment to day habilitation services would impose an 8-hour per week average (416-hour annual) cap on services for day habilitation for recipients living in group homes, who currently have a cap of 15 hours per week.[1] The amendments would also impose an 8-hour per week cap on services for day habilitation on recipients who do not live in group homes, who currently have no cap on the number of hours that can be approved for day habilitation. The proposed 8-hour cap applies to all providers of day habilitation,

[1] The Council commends the Department for responding to recipient requests to allow day habilitation service amount limitations to be applied annually, rather than as a weekly amount which would be lost if not used within a given week.

combined, and could be exceeded with a limited amount of additional hours upon a showing that the increase is needed for health, safety, or to protect against institutionalization.

For the reasons discussed below, the Council suggests that the Department should more closely align the maximum day habilitation hours with actual average usage among all users of day habilitation services; or set two different caps that reflect the averages within each of the two respective categories. The Council also feels that the Department should include an exception to the cap(s) that allows a showing of need for additional hours to implement specific person-centered planning goals that require day habilitation services for goals to be achieved.

<u>An 8-hour cap is not an appropriate limit for obtaining cost containment.</u>

The mean average usage of day habilitation services across users is 10 hours per week. But that mean calculation includes the service use of two diverse categories of users. Day habilitation users who live in group homes often use far fewer service hours than users who are in natural home environments.[2] The low usage among that category skews the average downward, and results in an inaccurate picture of the severity of the 8-hour limit for higher users who don't have access to replacement services that might be provided through group home activities and support.

One stated justification that has been given for reducing the maximum number of approved hours for day habilitation services is that, as recipients acquire the skills they need to be integrated into the community, day habilitation needs should decrease. Because day habilitation usage has increased, the proposed cap has been presented as a correction for overuse of the service. That justification assumes that there is some uniform reasonable or expected rate of skill acquisition, or that the upward trend in usage reflects misuse as opposed to greater integration of individuals in the community.

Another claim is that for individuals not in group homes, day habilitation hours have been used for supervision or companion care needs. The Council recognizes that day habilitation services are provided to acquire skills for achieving community integration and obtaining quality of life, not to provide supervision or companionship, as it is sometimes used. However, imposing an 8-hour per week cap regardless of actual need for day habilitation services to achieve personal goals for living in the community would prevent many recipients from acquiring needed skills, prolonging the need for day habilitation services. If there are currently Alaskans who have high day habilitation usage because of the need for companion care services, then the Council asks the Department to explore other options to address that need. Setting this 8-hour cap on services without addressing the need for companion services for some recipients -- or the practical difficulty of staffing services for a smaller number of available hours -- may cause the system to drift from person-centeredness, toward providing services in large groups.

Day habilitation is the tool for making community-based, person-centered practices an actuality, instead of an aspirational goal. Day habilitation is also a vital tool in an individual's path to employment in the

[2] Average Day habilitation use within the category of users who live in group homes has also been skewed downward by the loss of weekly hours – which are currently not rolled over but are lost if not used each week – that occurs when staffing issues prevent a recipient from participating in weekly day habilitation activities.

community at a competitive wage.[3] As an Employment First State, it is imperative that Alaska have opportunities for its waiver recipients that allow them to work on their skills in order to be ready for work-related services. In previous collaborative work with the Alaska Integrated Employment Initiative (AIEI) grant, much dialog occurred with SDS and the Division of Vocational Rehabilitation (DVR) regarding a common sequence and definition of employment services for Alaskans with disabilities. This dialogue resulted in day habilitation being noted as a critical service tool for individuals with disabilities who were not yet ready for DSDS pre-employment services or DVR services; or who would need far more time to develop skills than those limited services could provide. Capping day habilitation services at 8 hours a week without an exception outside of health, safety and risk of institutionalization, could present an additional barrier for achieving Alaska's Employment First goals.

<u>An 8-hour cap, without a person-centered exception, is not consistent with federal regulations on person-centered planning and on settings.</u>

Federal person-centered planning regulations require a process that offers informed choices to individuals regarding the services and supports they receive and from whom; that reflects services and supports that are important for people to meet their needs, as well as people's preferences; and, perhaps most important, that gives people full access to the greater community, including opportunities to engage in community life, control personal resources, and receive services in the community to the same degree of access as people not getting HCBS services under Medicaid.[i]

Federal settings regulations also require that the settings in which HCBS services are provided must be based on a person's needs; must give the person opportunities to engage in community life, control personal resources, and receive services in the community; must optimize, but not regiment, the person's independence in making life choices, including daily activities and with whom to interact; and must facilitate the person's choice about services and supports and who provides them.[ii]

If a person wants to get particular day habilitation services in the community, and meeting the person's needs requires more day habilitation than eight hours per week, federal law dictates that the person should get those services despite any general eight-hour-per-week limit and despite any exceptions criteria that focus only on health, safety, and avoiding institutionalization.

The Council requests that the Department reconsider an 8-hour cap on day habilitation hours that would be applied uniformly to individuals with different day habilitation needs. Isolating one service category for soft-cap implementation based on average utilization across the state appears to fall short of directives in federal regulations for person-centered planning, and may well generate more fair hearing appeals than the Department has capacity to handle while absorbing workforce reductions.

[3] And for recipients in rural Alaska, day habilitation is vital for learning and participating in subsistence activities. Subsistence is often a way people with disabilities make real contributions to their communities and is in fact recognized by Tribal Vocational Rehabilitation agencies as a viable employment outcome.

An 8-hour cap is not consistent with the proposed amendments regarding person-centered practices and settings.

As discussed, previously, the Department has proposed amendments to 7 AAC 130.200[iii], 7 AAC 130.218[iv], 7AAC 130.220(m) and (n)[v] which require the development and implementation of plans of care that are individualized, that include person chosen services and settings, are based on individually-assessed functional needs for maximizing engagement in community life. A cap on day habilitation service hours, without an exception that allows a recipient to receive additional hours of service related to achievement of a person-centered goal, is a uniform limitation applied without regard to an individual's actual need for services.

This cap is especially inconsistent with maximization of community engagement and autonomy because it limits hours for developing skills for independence and only allows more hours for services if they can be justified by needs for ensuring health, safety, or protection from institutionalization. These exceptions focus on imposed supervision and protection as opposed to the services for gaining chosen skills for a recipient's integration and independence. The proposed justifications for exceeding the cap are not related to the purposes of day habilitation. Setting a cap at 8 hours per week, with exceptions limited to only those health, safety, and risk of institutionalization is a step backward, away from the positive movement the state has been making toward individualization and person-centered services.

The Council requests that the Department consider including exceptions to the cap that have a direct relationship to the goal of the service, itself, and are person-centered. For example, exceptions could be written as to require proof that additional service hours were necessary because (1) the 8-hour limitation would cause a loss of a specific skill where there were no other opportunities for recoupment, or (2) that an emerging skill requires additional hours to get a solid foundation for progress, or (3) that past progress demonstrates that a skill goal was likely to be achieved within the waiver period applied for, if additional hours were approved.[vi]

Summary of the Council's Recommendations

The Council recognizes that cost containment is an important goal. A cap of 8 hours per week for all day habilitation results in far greater savings than the 14% reduction in annual day habilitation service costs, as was sought in the Governor's FY18 budget. **With regard to the proposed uniform 8-hour cap on day habilitation services for both categories of users, the Council urges the Department to instead create two distinct soft caps on day habilitation hours that would be applied differently to individuals with different needs for day habilitation services. The amount of hours of each cap should align more closely with the average usage within the two distinct categories of day habilitation service users; those who are living in group homes and those who are not. The Department should set the two different soft cap amounts at levels which meet the 14% reduction target for cost containment, based on the current costs of services within each of the two different user groups.** The Council also urges the Department to add an exception to the proposed section to allow a recipient to demonstrate that additional hours are needed to implement specific person-centered goals for increasing independence, maximizing community engagement, or improving or maintaining quality of life. Additionally, the Council urges the Department to attach a sunset

provision to these proposed changes to day habilitation limits, with a reexamination of the need for a limitation at such time as the planned implementation of the InterRAI assessment system is likely to result in more individualized data about usage and need.

We urge the Department to consider the alternatives outlined in this comment letter in light of the central role that day habilitation has in ensuring person-centered, individualized, community-based services.

We look forward to our continued collaboration with DHSS to create a system of home and community-based services that improves the lives of Alaskans with disabilities. If you have any questions regarding the Council's recommendations and/or comments, please contact Amy Simpson, Chairperson of the GCDSE, or Patrick Reinhart, Executive Director.

Respectfully,

Jeanne Gerhardt-Cyrus
Developmental Disabilities Committee Chair

Dean Gates
Medicaid Ad Hoc Committee Chair

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[i] See 42 C.F.R. § 441.301(c)(1)(vii) *Offers informed choices to the individual regarding the services and supports they receive and from whom.*

42 C.F.R. § 441.301(c)(2): The person-centered service plan must reflect *the services and supports that are important for the individual to meet the needs identified through an assessment of functional need, as well as what is important to the individual with regard to preferences for the delivery of such services and supports.*

42 C.F.R. § 441.301(c)(2)(i)-(xiii): The State must ensure that the setting chosen by the individual is integrated in, and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, *engage in community life, control personal resources, and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS.*
(ii) Reflect the individual's strengths and preferences.
(iii) Reflect clinical and support needs as identified through an assessment of functional need.
(iv) Include individually identified goals and desired outcomes.
* * *
(vi) Reflect risk factors and measures in place to minimize them, including individualized back-up plans and strategies when needed.
* * *
(xi) Include those services, the purpose or control of which the individual elects to self-direct.
(xii) Prevent the provision of unnecessary or inappropriate services and supports.

(xiii) Document that any modification of the additional conditions, under paragraph (c)(4)(vi)(A) through (D) of this section, must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:
(A) Identify a specific and individualized assessed need.
(B) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
(C) Document less intrusive methods of meeting the need that have been tried but did not work.
(D) Include a clear description of the condition that is directly proportionate to the specific assessed need.
(E) Include a regular collection and review of data to measure the ongoing effectiveness of the modification.
(F) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
(G) Include informed consent of the individual.
(H) Include an assurance that interventions and supports will cause no harm to the individual.

[ii]See 42 C.F.R. 441.301(c)(4). Home and Community–Based Settings. Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, *based on the needs of the individual as indicated in their person-centered service plan*:
(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, *engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.*
(ii) The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.
(iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.
(iv) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.
(v) Facilitates individual choice regarding services and supports, and who provides them.

[iii] Proposed amendment to 7 AAC 130.200: " . . .. These services, when implemented through a person-centered plan of care, *will provide opportunities for eligible individuals to receive services in the community and to maximize engagement in community life.* The individual and those chosen by the individual . . . will work . . . to align services and supports in a person-centered practice *that provides the full benefits of community living, and contributes to the achievement of the individual's goals.*
[iv] 7 AAC 130.218. Person-centered practice:
(a) Based on capacity and interest in participation, the recipient of home and community-based waiver services shall lead the planning process that results in a plan of care under 7 AAC 130.217.
(b) The providers selected by the recipient to render home and community-based waiver services must participate in a person-centered planning process
(1) recognizes and supports the recipient as central to the process with the authority to specify goals and needs, to request meetings at times and locations convenient to the recipient, and to revise the plan of care when necessary;
* * *
(c) The providers, selected in accordance with (b) of this section, must collaborate with the recipient and the individuals chosen by the recipient to participate in the planning process *to develop a written, person-centered plan of care for the recipient that*
(1) addresses the clinical and support needs identified through a functional assessment conducted in accordance with 7 AAC 130.213;
(2) reflects the recipient's strengths, and preferences for delivery of services and supports;
(3) *identifies the elements important to the recipient to achieve the quality of life the recipient wishes, including the recipient's goals and desired outcomes;*
(4) identifies
(A) the services and supports (paid and unpaid) that will assist the recipient to achieve those goals and outcomes;
(B) the providers of those services and supports, including natural supports;
(C) for each service
(i) *the number of units, the frequency, and the projected duration of that service; and*
(ii) an analysis of whether the service and amount of that service is consistent with the assessment of reassessment conducted under 7 AAC 130.213, the level-of-care-determination made in accordance with 7 AAC 130.215, and any treatment plans developed for the recipient;
(5) documents the options for services and supports that were offered to the recipient under (b)(5) of this section;
(6) reflects that the setting in which the recipient resides is chosen by the recipient;
(7) documents any modification of the requirements for provider-owned or –operated residential settings in accordance with 7 AAC 130.220 (p);
(8) reflects risk factors and measures in place to minimize risks, including an individualized back-up plan and strategies as needed;
(9) identifies the individuals responsible for monitoring the plan; and
(10) results in a document that
(A) uses plain language, and is written in a manner that is both accessible to a recipient with disabilities or limited English proficiency and makes the plan of care understandable by the recipient and the individuals important in supporting the recipient;

(B) is finalized and agreed to with the informed consent of the recipient and the recipient's representative, and signed by the recipient, the recipient's representative, and all individuals
* **
(d) The providers, recipient, and individuals chosen by the recipient to participate in the planning process must ensure that
(1) unnecessary or inappropriate services and supports are not included in the plan of care developed in accordance with (c) of this section; and
(2) *the settings in which home and community-based services are rendered are integrated in, and support full access to, the greater community*.
(e) Providers of home and community-based waiver services *shall develop and implement written policies and procedures to ensure services are provided in accordance with this section and with 7 AAC 130.220 (m) – (r).*

[v] Proposed amendments to 7 AAC 130.220:
(m) A provider certified to offer the following home and community-based waiver services *shall render those services in settings that are integrated in, and support full access by the recipient to, the greater community to the same degree of access as an individual that does not receive home and community-based waiver services:*
(2) *day habilitation services* under 7 AAC 130.260
* * *
(n) *A provider shall render each service, listed in (m) of this section, in a setting that*
(1) was selected by the recipient from among settings options that include non-disability specific settings;
(2) ensures the rights of the recipient to privacy, dignity, and respect, and to freedom from coercion and restraint;
(3) optimizes the recipient's initiative, autonomy, and independence in making life choices, including those for daily activities, physical environment, and interactions with others;
(4) implements the recipient's choices regarding services and supports, and the individuals that will provide them;
(5) assists the recipient that chooses to
(A) seek employment and work in competitive, integrated settings;
(B) receive services in the community;
(6) encourages and facilitates the recipient's engagement in community life; and
(7) provides the opportunity for the recipient to control the recipient's personal resources.

[vi] As an example, 7 AAC 130.260(c) might be amended to read:

(c) (1) If the recipient of day habilitation services is also provided group-home habilitation services under 7 AAC 130.265(f), **the department will not pay for more than [] hours per year of any type** [15 HOURS PER WEEK] of day habilitation services from all providers combined.
(2) For other recipients of day habilitation services, the department will not pay for more than [] hours per year of any type of day habilitation services from all providers combined.
(3) If the provider or recipient documents to the department's satisfaction, in a format approved by the department, that a limited amount of additional day habilitation hours are necessary to
(A) protect a recipient's health and safety,
(B) prevent institutionalization,
(C) keep the recipient from losing a specific skill where there are no other opportunities for recoupment,
(D) promote an emerging skill in order to get a solid foundation for progress, or
(E) ensure, based on past progress, that a skill goal is likely to be achieved within the waiver period applied for, the Department will approve a limited amount of additional day habilitation hours.
[THAT THE RECIPIENT IS UNABLE TO BENEFIT FROM ANY OTHER COMMUNITY SERVICE OR ACTIVITIES].
(Eff. 2/1/2010, Register 193; am 7/1/2013, Register 206; am ___/___/____, Register ____)
Authority: AS 47.05.010 AS 47.07.030 AS 47.07.040