BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
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ALASKA CHILDREN'S SERVICES, INC.	)	OAH No. 13-0182-MDA
	)	
	)	

DECISION

I. Introduction

The Division of Public Assistance audited Medicaid provider Alaska Children's Services' Medicaid claims for 2008. The audit identified certain claims as not compensable, and calculated the amount to be recouped based on a statistical extrapolation. ACS appealed the audit findings.

With regard to the audit findings that are based on ACS's failure to preserve required documentation, the Division's finding of overpayments are affirmed. The regulations require Medicaid providers to preserve progress notes for each individual service. Even though a provider may have very good internal controls and practices that make it likely that the document existed at the time of billing, if the required documentation is not preserved, the billing is considered an overpayment at the time of the audit.

With regard to the audit findings that are based on ACS's failure to show that mental health rehabilitation services were provided outside of the treatment foster home, seven of those findings are reversed, and two are affirmed. No regulation requires that a provider record the location of services, so if evidence in the clinical record indicates that the services were compensable, the burden is on the Division to prove that the documents in the clinical record do not demonstrate that the services were compensable. Evidence of a provider's internal processes can be used to supplement and interpret the evidence in the clinical record.

II. Facts

Alaska Children's Services, Inc., is a Medicaid provider that delivers services to troubled children in Anchorage. It dates its existence from 1890, when the Jesse Lee Home was founded in Alaska.[1]

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[1] McCarville testimony. Denis McCarville is the president and CEO of ACS.

The services offered by ACS include "treatment foster homes," which have also been referred to as "therapeutic foster homes" and "specialized foster homes." Treatment foster homes provide an alternative placement for youth who typically have maladaptive coping skills and might otherwise be in an institutional setting. The foster parents in these homes are trained to provide mental and behavioral health interventions in a structured environment so that the young people can work through their difficulties and be able to function in the community, home, and school.[2] Each child who receives services from ACS is provided with a treatment plan, which is overseen by a case manager.

ACS also provides therapies that help children develop the social and personal skills that are identified in a child's treatment plan as objectives for the child. The skills taught by ACS staff cover a wide gamut of areas; a typical plan might include issues like anger management, hygiene, and communication. In addition to the Foster parents who work with the child within the treatment home to help develop the skills, ACS also employs "case managers" and "activity therapists." These staff members provide individual, group, and family skill development to the children receiving services from ACS. A typical individual skill development session could involve an activity therapist meeting with the child at a store, mall, bowling alley, ceramics studio, or at ACS's building. The therapist will help work on skills that address the child's treatment objectives in the child's treatment plan. Skill development sessions frequently include interventions like role-playing, modeling, encouragement, and re-directing.[3]

ACS receives payments from the department for the treatments that it provides to eligible children. ACS is paid a *per diem* rate for children who are residents in treatment foster homes. Because the per diem rate assumes that interventions are provided as needed in the treatment home, the provider is not required to bill separately for each intervention that occurs in the home. It also means, however, that the provider *cannot* bill for a service or intervention that is provided in the treatment foster home, even if a staff member other than the treatment foster parent provided the service. Any service provided within the home is covered by the *per diem* rate. When ACS provides a service or intervention outside the treatment foster home—services like individual, group, or family skill development—it may bill separately for those services.

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2 *Id.*

3 Nelsen testimony. Kristie Nelsen is the special projects facilitator and compliance officer at ACS.

In order to comply with these and other Medicaid requirements, ACS has a systematic billing process. Its compliance officer, Kristie Nelsen, described how ACS has internal monitoring procedures that ensure its billings are compliant with Medicaid requirements.[4]

Two issues regarding ACS's recordkeeping are important in this case. The first is how ACS generates a bill from a billable therapy session. The process begins with the therapist. In 2008, when ACS was using paper (as opposed to electronic) documentation, the therapist was required to fill out a document called a "progress note" after a billable therapy session. The note was then given to the community programs coordinator, who reviewed it and returned it to the therapist if required information was missing. After the coordinator approved the note, the note was given to the billing entry clerk.[5] The billing entry clerk was herself a therapist.[6] She knew what was required in a progress note, and had a checklist for required information. If a progress note was not complete or contained an error, she returned it to the therapist or a supervisor.[7] Thus, under ACS's system, ACS believes that no bill for a therapy session could have been generated unless a progress note existed. And a progress note that was not compliant with all known requirements would be sent back for correction.

After the billing for the progress note was completed, the progress note would be placed in a binder. The binders were kept in a locked room.[8] The binders would be consulted for programmatic reviews of the child's progress. Ms. Nelsen testified that it is possible that a progress note might have fallen out of a binder, but she was not aware of that ever happening.[9]

The second important recordkeeping issue has to do with ACS's 2010 scanning project, which converted paper records into electronic records. Although ACS was converting to an electronic database for current records at around the same time that the scanning of paper records occurred, the two projects were not related. The scanning project was initiated because the paper records were voluminous, and because it would be easier to comply with privacy requirements if the records were converted to electronic records. Therefore, ACS undertook to convert all closed files to electronic records by scanning all paper records. Ms. Nelsen acknowledged two shortcomings in the scanning project. First, the scanning equipment was not state-of-the-art. It

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4 *Id.*
5 *Id.*
6 *Id.*; Sarafin testimony. Setsuko Sarafin is an activity therapist and billing clerk at ACS.
7 Sarafin testimony.
8 Nelsen testimony.
9 *Id.*

did not have indexing or meta-data capabilities.[10] Second, the volume of paper that had to be scanned was overwhelming. ACS had to bring in temporary workers to do the scanning, and its trained staff could not supervise the project closely enough to ensure that errors like misfeeds did not occur.[11]

Turning to the audit of ACS that gave rise to this appeal, as required by statute, the program integrity unit within the Division of Public Assistance, Department of Health and Social Services, periodically audits Medicaid providers. The audit process involves selecting a random sample of claims, and reviewing them for errors. The error rate for the sample is then extrapolated to the entire population for determination of overpayments.[12] A confidence interval is then applied to the total extrapolated overpayments to determine a preliminary amount due. Preliminary findings are shared with the provider, who has an opportunity to provide additional documentation and explanation to refute the findings of overpayments. A final audit report is then prepared and distributed.

In 2010, ACS's claims for 2008 were selected for audit. The audit was conducted by the audit firm Myers and Stauffers, LC, which has a contract with the department to conduct Medicaid audits. In 2008, ACS had made 5,934 claims for services and received $4,616,279.50 in payment.[13]

Sixty-seven claims were identified for inclusion in a random sample selected for audit. T. Allen Hansen, a Meyers and Stauffer manager, and the lead auditor on the team that conducted the audit, explained that the sixty-seven "claims" were "at the header level." Under each header were many line items of specific services for which compensation was claimed. The audit examined each line item, and if a line item could not be verified, it was identified as a possible overpayment. The audit included both desk work and, in March 2012, an onsite field examination of documents.[14]

The audit also identified some "nonmonetary" issues—issues that the provider needed to address, but that did not result in a finding of overpayment. An example of a nonmonetary issue

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10 *Id*.

11 *Id*.

12 The audit in this case also included a high-level analytical process that involved applying queries to the claims data to search for duplicates or overlapping claims that warrant further investigation. Hansen testimony. This hearing does not involve any issues that arose out of this high-level initial analysis. *Id.;* Division Exhibit 5 at 5-6.

13 Division Exhibit 5 (Record at 1).

14 Hansen testimony.

is four claims for which the auditor could not identify that ACS had reviewed the treatment plan as frequently as required. Because the existing documentation was sufficient to prove that the services provided were medically necessary, the services still qualified for payment.[15]

After the audit was completed, preliminary findings were sent to ACS. ACS's comments and further submissions resulted in reductions to the preliminary findings. On January 15, 2013, the final audit letter was sent to ACS by Douglas Jones, the manager of the program integrity section of the Division of Public Assistance within the Department of Health and Social Services. The letter identified $233,153.45 in Medicaid overpayments, and requested repayment. ACS appealed the assessment, and through mediation, the parties resolved some of the issues. On September 18, 2014, ACS filed a motion for summary adjudication on the disputed claims related to services where the auditor could not determine the location of the services. The motion was denied because it appeared to raise disputed issues of fact.[16] A hearing on the remaining issues was held on December 12-13, 2013, in Anchorage. Carolyn Heyman-Layne represented ACS and Assistant Attorney General Scott Friend represented the Division.

III. Discussion

The issues remaining in this case can be divided into two categories of claims:

(1) Claims where documents required for compensation are missing. For these claims, the progress note is missing. Because the regulations require that a progress note be generated and preserved whenever service is delivered, the Division determined that any claim that was not supported by a progress note was an overpayment.

(2) Claims for mental-health rehabilitation services where the auditor could not identify the location of the additional services.[17] If the auditor could not determine where the services occurred, the auditor assumed the services occurred within the treatment foster home. If the services occurred within the treatment home, they were paid for by the *per diem* rate and are not separately compensable. Accordingly, the Division determined that those claims were overpayments. These two issues are discussed below.

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[15] Division Exhibit 5 (Record at 9).

[16] Order Denying Motion for Summary Adjudication (Oct. 8, 2013). The Order allowed ACS to come forward with additional support for its argument at the hearing.

[17] The audit letter describes this second category of overpayments as follows: "claims for which on each sampled date of service the provider had billed both behavioral rehabilitation services (e.g., procedure code H0018) and mental health rehabilitation services (e.g. procedure codes CDACM, CDAKQ and CDAEP) for the sampled recipient." Division Exhibit 5 (Record at 10).

A. Should ACS be paid for claims for which required documentation is missing?

The 2008 version of the Medicaid regulations that apply to this case required that "[a] provider of mental health services shall maintain a clinical record of services provided to a recipient."[18] The clinical record had to include many elements.[19] With regard to the issue in this case, which involves the records that must be kept to document specific services, the regulation required "a progress note for each service for each day the service was provided, signed by the individual provider; the progress note must describe the credentials of the provider, the service provided, the date of the service, the duration of each service, and the recipient's progress toward identified treatment goals."[20] The regulations also required that "[a] provider shall retain the

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[18] 7 AAC 43.728(a) (1997).

[19] *Id.* Required elements in the clinical record included an intake assessment, treatment plan, and, in some cases, a psychiatric assessment and a functional assessment.

[20] 7 AAC 43.728(a)(5) (1997). A different regulation, 7 AAC 43.030, also applied and required the same or similar documentation as was required under 7 AAC 43.728:

> (a) A provider shall maintain accurate financial, clinical, and other records necessary to support the care and services for which payment is requested. The provider is responsible to assure that the provider's designated billing service, or other entity responsible for the maintenance of financial, clinical, and other records, meets the requirements of this section.
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> (b) A provider's record must identify patient information including
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> (1) recipient receiving treatment;
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> (2) specific services provided;
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> (3) extent of each service provided;
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> (4) date on which each service is provided; and
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> (5) individual who provided each service.
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> (c) A provider's record must identify financial information including
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> (1) the date of service and charge for each service provided;
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> (2) each payment source pursued;
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> (3) the date and amount of all debit and credit billing actions for each date of service provided; and
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> (4) the amounts billed and paid.
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> (d) A provider shall maintain a clinical record, including a record of therapeutic services, according to professional standards applicable to the provider, applicable state and federal law, the applicable Alaska Medicaid Provider Billing Manual as of May 9, 1997, and any pertinent contracts. The clinical record maintained by the provider must have clinical information to
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> (1) identify the recipient's diagnosis;
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> (2) identify the medical need for each service;
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> (3) identify each service, prescription, supply, or plan of care prescribed by the provider, if applicable; and
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> (4) include annotated case notes, signed, dated, or initialed by the individual who provided the service, for each service delivered.

7 AAC 43.030 (1997) (repealed 2010). The reason for the duplication is not clear. In discussing the requirement of documentation, this decision will generally apply 7 AAC 43.728(a) where applicable, because that regulation was specific to "a provider of mental health services," was cited by Mr. Hansen in his testimony, uses the term "progress note," and has not been repealed. 7 AAC 43.030(1997) remains important in this appeal, however, because it adopted the Medicaid provider billing manual of 1997, and established the requirement that records be retained for seven years.

financial, clinical, and other records of a patient for which services have been billed to the Medicaid program for at least seven years from the date the service is provided."[21]

ACS's practice was to require its staff to prepare a document called a "progress note" each time the staff performed a billable service. All of the required information was recorded on this progress note.[22] At the time of the audit, ACS did not have the progress notes for the claims that are at issue here.

ACS has made several arguments to establish why it should be paid for the claims in spite of the missing records. These arguments can be summarized as follows:

- ACS has a billing system that did not permit the claim to be billed unless a valid progress note existed. Therefore, the progress notes existed at the time the claim was billed and paid.
- ACS was not at fault. In spite of ACS's best effort, some records simply were not scanned.
- By cross-referencing to other documents, ACS is able to "backfill" much of the information that would have been included in a progress note. Through this process, the service provided, the provider, and the date, time, and duration of the service can generally be established.

These arguments can be divided into two general approaches. First, ACS asks for a ruling that its process is sufficient to prove that the required documentation existed. In the alternative, ACS asks for a ruling that the documentation it does have is sufficient to meet the regulatory requirement.

1. Does ACS's careful billing process prove that ACS has met the recordkeeping requirements?

ACS admits that it does not have the progress notes for the billings at issue. It argues, however, that it has proved a progress note existed at the time the services were billed. It points to its internal billing process, which required a progress note to generate a bill, as proof that a progress note existed at the time each of these bills was generated. ACS asserts that denying compensation here would be an unreasonable application of a record-keeping requirement to

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[21] 7 AAC 43.030(e) (1997).

[22] The term "progress note" could be a little confusing because within the "progress note" one of the required elements of documentation was the client's progress toward the treatment goals. This element was often referred to at the hearing as the progress note, and the outcome here turns on the lack of documentation of progress.

deny it a benefit that it has earned. In its view, it complied with the substance of the law, and denying payment on the basis of missing documents is putting form over substance.

In response, the Division explained that the information required to be in a progress note is necessary to ensure that the service was provided and properly billed. Mr. Jones testified that the requirement of documentation was crucial to the Division's ability to detect fraud. Although he acknowledged that ACS took care with its billing practice, and was not a candidate for a fraud investigation, he was concerned that letting one provider off the hook for incomplete documentation would substantially undercut the Division's ability to detect fraud. In addition, the Division asserts that it is not elevating form over substance because it would accept documentation that contained the elements required under 7 AAC 43.728(a)(5) without regard to the form or the name of the document.

ACS is asking that the existence of the progress note be inferred from the high-quality of its internal processes. ACS has not, however, provided any cases in which a Medicaid provider's internal quality control procedure was deemed sufficient to substitute for the requirement of documentation. Indeed, the Commissioner has upheld findings of overpayment based on inadequate documentation, explaining that "[p]roper documentation is a requirement of participation as a provider in the Medicaid program."[23]

Moreover, in the absence of adequate documentation, both the commissioner and the court have refused to infer that the services were provided. In *In re Family Medical Clinic*, the Commissioner strictly enforced a regulation that required the provider to produce documents that identified the name of the person who provided the treatment and the part of the patient's body that was being treated. [24] The Commissioner refused to infer who provided the service from the clinic's record of who ordered the service, and refused to infer what area was treated from the physical examination notes. The Commissioner acknowledged that the notes might make some sense in the context of the clinic's practice, but rejected the non-conforming documentation because it was "not sufficient for an outside auditor to determine the required information."[25]

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[23] *In re Anchorage Medset Pharmacy*, OAH No. 10-0641-DHS at 7 (Commissioner Health and Soc. Servs., 2010).

[24] OAH No. 10-0095-DHS at 5-6 (Commissioner Health and Soc. Servs., 2010)

[25] *Id.*

ACS's argument is reminiscent of the argument made by the provider in *Hidden Heights Assisted Living, Inc. v. State, Dep't of Health and Social Services.*[26] In that case, the provider "impliedly argued that proof of the residents' physical presence should be accepted as proof that the residents received reimbursable services on those dates."[27] The court affirmed the Department's refusal to infer that services were provided.[28]

Here, ACS is asking the Department to accept proof that its billing system relied on the existence of a progress note as proof that a progress note existed.[29] ACS's argument is more nuanced than that made by Hidden Heights, in that ACS has a sophisticated billing system that would support an inference that compensable service was in fact provided. Nevertheless, at the end of the day, it comes down to whether the absence of required documentation is a sufficient ground to deny a payment. As occurred in *Hidden Heights,* where the regulations require that documents be preserved to validate the billings, the billings may be denied for lack of documentation.[30]

Moreover, ACS's arguments based on its general practice would undermine the audit process. The question here cannot be "for each undocumented claim, is it more likely than not that the service was provided?" For a careful provider like ACS, the answer to that question would almost certainly be "yes." Yet, even a careful provider will make errors, and the purpose of the audit is to establish an error rate. In order to establish an error rate, an audit asks whether a provider has met the formal legal requirements. Here, ACS has not met the requirement that it retain progress notes. Although ACS argues that this result is form over substance, "[s]ometimes, though, form is important."[31] Accordingly, ACS's blanket argument that its billing process was sufficient to prove that the services occurred is rejected.

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[26] 222 P.3d 258 (Alaska 2009).

[27] *Id*. at 265.

[28] *Id*. at 270 (finding that substantial evidence supported hearing examiner conclusion that exhibit offered by claimant "did not document the provision of compensable services").

[29] For at least one claim, ACS had yet a stronger argument that the progress note likely existed at the time of billing and that the reason the progress note was not available at audit was due to scanner error. This proof included a shadow on the electronic record of the document for the day before the day of the billed treatment. The shadow almost certainly looks like the missing document was inadvertently pulled through the scanner on top of the copied documents, so that the missing document was not scanned.

[30] *Hidden Heights,* 222 P.3d at 269-70 (affirming department's interpretation of "7 AAC 43.030(b) as requiring that Hidden Height's documents record the services provided and who provided them").

[31] *Hickel v. Southeast Conference,* 846 P.2d 38, 70 (Alaska 1992). *Hickel* was interpreting redistricting law, not Medicaid law, so the quoted text is not cited as controlling law, but for the concept that at times form can be important.

2. Do the documents in the record show that ACS has met the recordkeeping requirements of 7 AAC 43.728(a)(5) and 7 AAC 43.030?

ACS's second argument relating to the undocumented claims is that it can provide enough of the information regarding the missing progress notes to satisfy almost all of the recordkeeping requirements of 7 AAC 43.728(a)(5) and 7 AAC 43.030. In ACS's view, the information in the record is sufficient to find compliance with the recordkeeping requirements.

The documents compiled by ACS include the billing documents, which identify the date of the service and the recipient. For many (but not all) of the billed services, ACS was able to find a schedule that documented who was scheduled to provide a service for that child on that day, and how long the service was to last. For a few of the missing records, ACS had progress notes kept by others who had contact with the child, such as the foster parents or the case manager, from which ACS was able to reconstruct some of the therapy that was provided for that child on that day. Mileage logs submitted by the therapist often provided documentation that a therapist was performing a compensable activity during the day in questions, and sometimes these logs would note the recipient. Because mileage logs were signed, mileage logs also, in ACS's view, met the signature requirement. The therapist's credentials were available on file at ACS. ACS conceded, however, that for all of the billed services at issue, it did not have documentation that would meet the requirement of documenting "the recipient's progress toward identified treatment goals."

Personnel from the Division testified that the Division would allow ACS to meet its recordkeeping requirements in a variety of ways. Mr. Hansen, Mr. Jones, and Ms. Brown, the Division's Medical Assistance Administrator, all indicated that the absence of a label "progress note" would not be fatal to ACS's claim—they would accept any documentation that could be reasonably construed to meet the requirements of the regulation.

Here, however, the Division was critical of the quality of the documentation assembled by ACS to meet the requirements of 7 AAC 43.728(a)(5). It considered a schedule to be unreliable evidence that a service was actually provided. Plans can change and mistakes can be made so that scheduled services may never occur. In the cases in which the progress notes of other providers mentioned the activity that was the subject of the missing progress note, the person writing the note did not have first-hand knowledge of the actual service provided by the therapist. In addition, without documentation that the service was targeted to progress toward established goals, the Division cannot confirm that the service was compensable.

The Division's criticisms are well-taken. A schedule is not proof that the service occurred, and a note from one provider that mentions in passing a service provided by a different provider is not conclusive evidence of what actually occurred. Yet, if only one element from a progress note was missing, the type of evidence produced by ACS, when considered in conjunction with the other elements in the progress note, might be sufficient to meet the recordkeeping requirements.[32] The problem for ACS here, however, is twofold. First, the entire progress note is missing, so the lower quality of proof provided by assembling other documents makes it much more difficult to meet the recordkeeping requirement in a way that would suffice to prove that compensable services were provided. Second, documentation of the client's progress toward goals is required by regulation.[33] Its absence cannot be overlooked, and no other documents or testimony at the hearing provided evidence of the progress made during the therapy sessions at issue. Because none of the contested claims have documentation of the progress made during the therapy session, all of the contested claims must be deemed overpayments.

3. Are the missing records so insubstantial that the department must consider the records complete?

ACS has also argued that it would be an abuse of discretion, and possibly a violation of due process, for the department to deny compensation for services in these circumstances. ACS cites to the Alaska Supreme Court decision in *State, Dep't of Health and Social Services v. Valley Hospital, Inc.*, for the proposition that "courts have agreed that procedural due process requires agencies to consider actual costs to medical facilities, rather than strictly adhere to regulatory schemes that underestimate reimbursements."[34] Arguing that strict adherence to the regulatory scheme here would lead to under-compensation, ACS believes that the department is required to relax its regulatory requirement of documentation in the face of proof that services were provided. In its view, any other result would unfairly deprive ACS of its entitlement to payment for services rendered.

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[32] *Cf. Hidden Heights*, 222 P.3d at 270 (remanding case to department for consideration of testimony and exhibit of single service record). *Hidden Heights* appears to stand for the proposition that if the department offers an evidentiary hearing for a Medicaid provider, the department must accept and evaluate the evidence offered by the provider. The underlying question here is whether the evidence meets the documentation requirement of the regulation.

[33] 7 AAC 43.728.

[34] 116 P.2d 580, 584 (Alaska 2005) (citing *Alabama v. Shalala*, 124 F.Supp.2d 1250, 1264 (M.D. Ala. 2000)).

Valley Hospital involved a different process than the audit process involved here. *Valley Hospital* involved the rate-setting process, and a long line of cases have addressed the rights, both procedural and substantive, that regulated industries have to a fair rate.[35] Further, in *Valley Hospital*, the agency was not given notice that its distribution of incorrect data would affect its rate going forward, and the regulation that the department was enforcing may not have been properly promulgated, at least for the purpose for which it was being applied.[36] Moreover, *Valley Hospital* makes clear that a harsh result from neutral application of a regulatory standard does not trigger any obligation in the administrative agency to mitigate the effect of its reasonable regulations.[37]

In contrast, this case involves application of the requirement that an audited entity must retain documents in order to verify its entitlement to payment for services rendered in the past. An audit necessarily encompasses application of requirements for documents because without documents there would be nothing to audit. As the court held in *Hidden Heights,* document retention is a requirement for payment under Medicaid.[38] Providers are on notice that documentation is required for compensation, and strict enforcement of the requirement of documentation would not violate procedural due process. No cases indicate that the *Valley Hospital* doctrine applies to findings of overpayments in audits.

Although *Valley Hospital* is not directly applicable to this case, ACS may have a good point. At some extreme, reliance on an insubstantial documentation requirement to deprive a provider of substantial payments could be unfair. Indeed, in rejecting the application of *Valley Hospital* in a subsequent case, the court limited the *Valley Hospital* doctrine to cases where the department's interest in the regulatory requirement was insubstantial.[39] Moreover, the Division's own practice of designating some errors as "nonmonetary" errors demonstrates that the Division will not strictly enforce requirements to impose unreasonable monetary burdens on providers.

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35 *See, e.g., Far North Sanitation, Inc. v. Alaska Pub. Util. Comm'n,* 825 P.2d 867, 873 (Alaska 1992) (citing cases that acknowledge fundamental rules of ratemaking).

36 *Valley Hospital,* 116 P.2d at 587.

37 *Id*. ("agencies will seldom act improperly by adhering to their regulations, even when the results in individual cases are harsh").

38 *Hidden Heights,* 222 P.3d at 269.

39 *See Squires v. Alaska Bd. of Architects, Engineers & Land Survey,* 205 P.3d 326, 338, n.58 (Alaska 2009) (distinguishing *Valley Hospital* where "the agency's reasons for adhering to the regulation in the circumstances were "so insubstantial as to render [it] an abuse of discretion'" and upholding strict application of a regulatory requirement because "valid and substantial reasons support the third-party verification requirements here.").

Here, however, the department's interest in having providers preserve the progress note is substantial. Mr. Jones explained that the documentation requirements in the regulation are necessary for enforcement purposes. In his view, those requirements must be applied even-handedly to all providers, including exceptionally diligent providers, in order to make sure that the agency can identify and prosecute the ne'er do wells. And Ms. Brown testified that the documentation requirements in regulation are consistent with federal Medicaid requirements that states must enforce.[40] In short, the department's substantial interest in having providers retain a progress note is an additional reason that *Valley Hospital* does not apply here.

B. Should ACS be paid for claims for which the auditor was unable to find documentation that the service was provided outside of the treatment foster home?

The second issue in this case also involves an audit finding that ACS did not adequately document some of its claims for compensation for services. Here, however, the reason for the finding of overpayment is very different from failing to preserve a document that is required by regulation to be preserved. In this category of claims, the claims were denied when ACS's documentation did not indicate that the services were performed outside the treatment home. Because services performed within the home were not compensable, the claims were denied.

ACS therapists often delivered skill development services at public locations in the community, including bowling alleys, malls, schools, or art facilities. Sometimes the services were delivered at ACS's facility, which had two rooms dedicated to service delivery. Although ACS did not require its therapists to note the location of the services on the progress note, for many of the claims, the auditors were able to identify the location of the services by reading the narrative description of the services contained in the progress note. Those claims were approved. For claims where the auditors could not identify a location, however, the auditors assumed the services were provided in the home, and denied the claim.

ACS raises several arguments regarding these claims. First, it argues that the absence of a regulation requiring it to state the location of the service means that the department cannot deny a claim for a failure to state the location on a progress note. Second, ACS had strict rules that all individual skill development sessions had to occur outside the home, and that any family

[40] Ms. Brown also discussed the Division's quality assurance principles. *See* 7 AAC 160.140. According to Ms. Brown, under the quality assurance program, a provider that identified deficiencies in its documentation could take steps to cure the deficiencies. Although this issue was not fleshed out, the availability of a retroactive cure as a safety valve would appear to eliminate the concerns addressed in *Valley Hospital*, even if that cure was not available to the particular provider in a particular case.

skill development sessions that occurred in the home had to be marked N/B for "non-billable." Given no evidence that anyone at ACS ever broke these rules, in ACS's view these rules should suffice to prove that it did not provide the questioned services in the home. Third, ACS argues that it has evidence from its documents—particularly the mileage logs submitted by the therapists—to support an inference that in each contested case the service was delivered outside the treatment home. In ACS's view, an inference is all that is required for it to pass the location test, and none of these claims should be deemed overpayments. Each of these three arguments is discussed below.

1. Does the absence of a regulation requiring a provider to specify location on its bills mean that the department cannot deny a claim for failure to specify location?

Alaska law requires that all rules that apply to the public must be adopted in regulation to be enforceable.[41] Here, ACS is characterizing the auditor's action as requiring it to specify a location in its bills. Accordingly, in ACS's view, this is a rule of general application and is unenforceable because it has never been adopted into regulation.

ACS is correct that if the department were to try to enforce a strict requirement that all bills must specify location, that would be a rule of general application, and it would have to be adopted in regulation to be enforceable.[42] The regulations enumerate the specific items that must be included in the clinical record of services provided, including the specific service provided, the extent of the service, the date, and so on.[43] No regulation specifically requires a provider to identify the location of the service.

Yet, the department's regulations make clear that a provider is required to "maintain accurate financial, clinical, and other records necessary to support the care and services for which payment is requested."[44] This regulation put ACS on notice that it had to maintain records that would prove that the service was compensable. Because the services had to be provided outside the home to be compensable, ACS was on notice that it had to maintain documents that would show that the service was performed outside the home.[45]

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41 AS 44.62.640(3) (definition of regulation).

42 *See, e.g.*, *In re Talkabout, Inc.*, OAH No. 11-0320-DHS at 4-7 (Commissioner Health and Soc. Servs. 2011) (rejecting audit findings that expanded the regulatory record-keeping requirements).

43 7 AAC 43.0230; 7 AAC 43.728.

44 7 AAC 43.030(a).

45 A complication that does not affect the analysis, but must be noted for the record, is that the exception that allows compensation for services performed outside of the treatment home was not adopted into regulation. The

ACS argued that in the absence of a regulatory requirement specifying that location of services must be noted on the progress note, it would have no way of knowing that the auditors might require it to prove that the service occurred outside the treatment home. It compared this situation to other requirements for compensability for which the auditors never required documentation. An example ACS gave at the hearing was the requirement that mileage compensation was not available in certain circumstances, yet the auditors never required ACS to document the exact driving route or location to prove that its mileage claims were compensable. In ACS's view, that shows that the standard at audit is to accept that the provider is following the law, and that the audit will only be based on the presence or absence of the specific items that are listed in the regulation.

ACS's view is incorrect. An audit is an enforcement action, and an enforcement action requires the agency to apply the law to the facts. Here, the law requires that a provider be able to prove at the audit that the service was compensable. Given that mental health rehabilitation services provided inside the treatment foster home were not compensable, the Division can reasonably require that ACS retain documents to show that these services were performed outside the home.

ACS's argument about the lack of a requirement to document the location of the service does, however, affect the analysis. ACS will not be required to produce documents that prove the *location* of the service. If the evidence supports a finding that it was more likely than not that a specific qualifying service was performed outside the home, the service would be compensable and thus not an overpayment. This would be true even if the location of the services was unknown, as long as the evidence indicated it was not in the home.

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general rule is that all services are compensated by the *per diem* payment for behavioral rehabilitation services, and that mental health rehabilitation services cannot be billed on the same day that a *per diem* payment for behavioral rehabilitation services is paid. 7 AAC 43.481. An exception allowing additional compensation for "[o]ther Rehabilitation services" provided "in sites other than within a specialized foster home or residential setting receiving the $171 daily rate for a recipient" was included on page I-26 of the 2008 version of the Division's Provider Billing Manual. Division's Exhibit 1. This exception was not, however, adopted in regulation because the regulations adopted the 1997 version of the Provider Billing Manual, which did not provide for the exception. 7 AAC 43.030(d) (2008). For purposes of this hearing, however, the parties agreed that the exception on page I-26 of the 2008 version of the manual was enforceable as if it was in law.

2. Does ACS's proof that it prohibited its activity therapists from providing individual skill development inside a treatment home mean that it has proved that the services were provided outside the home?

Doug White, the Director of Community Programs at ACS, testified that he supervised the delivery of services by therapists. Mr. White was very persuasive that it would be highly unusual for one of ACS's therapists to conduct an individual skill development session inside a treatment foster home. With regard to family skill development, that might occur inside a treatment home, but if so, the therapists were trained to mark the progress note as non-billable.

ACS argues that the auditors were presuming that a failure to specify location meant that the service was conducted in the home. In ACS's view, its evidence of its internal rules is sufficient to rebut that presumption. Therefore, ACS concludes, the auditor should presume that the service was provided outside the home unless the evidence indicated otherwise. Because the Division does not have evidence that the disputed services were not provided outside the home, ACS believes that it has shown that there were no overpayments.

ACS's argument, however, misses the point. The issue here is that 7 AAC 43.030(a) required that providers maintain a clinical record sufficient to prove that the service provided was compensable. Because the service must be provided outside the home to be compensable, ACS must retain records that show that the services were provided outside the home.

Here, Mr. White has provided credible evidence that ACS has a habit and a routine of not providing individual skill development sessions inside the home. The purpose of this audit, however, was not to determine whether a provider had habits or routines that tend to follow the law. The purpose of this audit was to determine how often a provider failed to follow routines that comply with the law.

Mr. White did not have first-hand knowledge of any of the disputed sessions. His testimony about ACS's usual practice is not a substitute for documentation, and the regulation requires the provider to maintain a clinical record that shows that the service was compensable. Although he made clear that it would be highly unusual for an individual skill development session to occur in a treatment home, he could not say with certainty that it *never* occurred. Therefore, Mr. White's evidence will not, in and of itself, negate the findings at audit. Yet, as will be seen below, his credible testimony is significant with regard to evaluating the evidence in the record. Here, because ACS has so thoroughly established that it has internal rules that would make delivery of individual skill development services inside the home highly unusual, even a

weak inference from ACS's documentary evidence will suffice to conclude that the service more likely than not occurred outside the treatment foster home.

3. Does the evidence in the record support a reasonable inference that the services in dispute were delivered outside the treatment home?

As with the issue of the missing progress notes, for each disputed claim, ACS has compiled evidence from multiple sources to support its contention that the services in question were provided outside the treatment home. In reviewing this evidence, Mr. Hansen expressed caution and skepticism that tertiary evidence—evidence other than the progress note—would suffice to document that the services were not rendered in the home. This caution might have carried the day in this hearing but for the two considerations discussed above. First, because the regulations do not explicitly require documentary evidence of location, the department may rely on any evidence in the clinical record to infer that the services were provided outside the treatment home. Second, given the foundation laid by Mr. White that it would be very unusual for his staff to provide services in the home, and by Ms. Nelsen that ACS was diligent about enforcing compliance with its internal rules, the department can be comfortable with drawing inferences from this evidence. With this standard in mind, each of the ten disputed claims will be analyzed as follows:

1. Claim 3, Line 1 (recipient initials T.B.). Case manager Jennifer Stinnett delivered skill development services to T.B. on November 20, 2008, at 6:15 p.m. T.B. lived at a group home called McCauley Manor.[46] When Ms. Stinnett drove to McCauley Manor, her mileage log would be marked with the abbreviation McM.[47] Her mileage log for November 20th does not show any trips to McCauley Manor. It does show, however, that on November 20th, after attending court, Ms. Stinnett returned to "CP." "CP" stands for "Community Program," meaning the ACS facility, where therapy sessions with students often occurred.[48] In addition, Ms. Stinnett's mileage logs show the purpose of her trips, and when she leaves the ACS facility for an individual or group skill development session, the log shows "ISD" or "GSD" in the purpose column. She did not leave the facility on November 20 for an individual or group skill development session.[49] The inference ACS draws from the mileage log is that Ms. Stinnett returned to the ACS facility after court in order to meet with student T.B. at 6:15 p.m., and that

[46] Nelsen testimony.
[47] ACS Exhibit T at 11.
[48] White testimony.
[49] ACS Exhibit T at 11. *See also* ACS Exhibit BB at 1 (progress note).

the session took place at the ACS facility. The inference is weak because Ms. Stinnett could have traveled to McCauley Manor by means other than her personal car. Given Mr. White's testimony that for ACS individual skill development was by definition outside the foster treatment home, however, and that a case manager is likely to follow internal rules, this mileage log supports ACS's claim that this service occurred outside the home and is compensable.

2. Claim 8, Line 2 (recipient initials C.C.). This individual skill development session was conducted by a case manager. The progress note describes coaching on daily hygiene, doing chores, doing laundry, and having honest interactions with the case manager. The progress note ends with the statement "CM also provided access to DMV to renew State I.D." [50] The progress note created by the treatment foster parent for that day described the interaction between the foster parent and the student in the morning before school, and then noted that the parent "encouraged C to have a good day at school [and] encouraged C to remember his meeting with his case manager. Once home [the parent] prompted C to share his day, [and] praised C on his new ID."[51] ACS argues that the fact that the case manager took the student to DMV shows that the service was delivered outside the house, and speculated that the therapy sessions might have been delivered in part while in line at DMV. The Division argues that going to DMV was not a mental health rehabilitation service. The statement in the foster parent's note to the effect that in the morning the parent reminded the student to attend the therapy session implies that the therapy would occur outside the home after school. The statement that the foster parent praised the student for his new ID "once home" implies that the student was away from home the entire time until returning with his new ID. These are weak inferences, and in other circumstances would not support a conclusion that the services were compensable. Here, however, given the testimony of Mr. White that individual skill development sessions simply did not take place in the home, and the fact that these services were provided by a case manager, this evidence is sufficient to support ACS's claim that this service occurred outside the home and is compensable.

3. Claim 14, Line 5 (recipient initials S.E.). Activity Therapist Martina Diamond delivered individual skill development services to S.E. on August 20, 2008. Ms. Diamond's

[50] ACS Exhibit G (Record at 93).
[51] ACS Exhibit G.

mileage log for August 20th records, "No Name to CP to Spenard to Taku Lake to No Name."[52] No Name Elementary is S.E.'s school. "CP" is short for "community program," which is ACS's facility. "No Name" is the name of the home where S.E. was living at the time. The progress note for the August 20 therapy session records that time was spent working on accepting and practicing program rules and processing the day's activities.[53] The mileage log supports an inference that Ms. Diamond picked up S.E. at school, went to the ACS facility for certain interventions, then to community locations (Spenard, Taku Lake) for additional training before taking S.E. home. In conjunction with other evidence, the mileage log supports ACS's claim that this service occurred outside the home and is compensable.

4. Claim 18, Line 1 (recipient initials T.F.). Activity Therapist Vera Stein provided the individual skill development to T.F. on August 18, 2008.[54] Ms. Stein noted on the progress note that they worked on Objective 2 for T.F., which involved T.F. engaging with adults in a positive manner.[55] The mileage log for Ms. Stein specifically referenced student T.F. and recorded the following: ACS-Base-ACS-Valley Moon Park-Base."[56] The student, T.F., lived on a military base.[57] Ms. Stein's mileage log supports an inference that she picked up T.F. at T.F.'s home on the base, drove to ACS for a therapy session, then to a public park for a further session, and then took T.F. back to the military base. The therapy provided—interaction with one or more adults—could reasonably occur at ACS and a park. The mileage log supports ACS's claim that this service occurred outside the home and is compensable.

5. Claim 23, Line 4 (recipient initials E.H.) Activity Therapist Jose Alvarez provided therapy on December 19, 2008, to address issues including appropriate tone of voice, honesty, verbal compromising, and accomplishing verbal agreements without excuses.[58] The session ran from 2:00 pm to 5:45 p.m. Mr. Alvarez's mileage log references student E.H., and shows "school ACS DC."[59] "DC" means "Dimond Center."[60] This mileage log supports an inference that Mr. Alvarez's therapy session occurred first at ACS—possibly for some

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52 ACS Exhibit T at 2.
53 ACS Exhibit H (Record at 1602).
54 ACS Exhibit I (Record at 1898). The bill date was mistakenly entered as August 15.
55 *Id.*
56 ACS Exhibit T at 10.
57 Nelsen testimony.
58 ACS Exhibit J at 1 (Record at 2301).
59 ACS Exhibit T at 1.
60 Nelsen testimony.

preteaching—and then at Dimond Center to practice the skills. That this session included time at ACS is proved by a case management note that E.H. made a report of pornography on an ACS computer at ACS at 4:45 p.m. on December 19, 2008. These documents support a relatively strong inference that the skill development session occurred outside the home and is compensable.

6. Claim 23, Line 8 (recipient initials E.H.). Activity Therapist Jerry Grower provided therapy to E.H. on Saturday, December 20, 2008, working on not asking questions that he knows the answers to, and encouraging E.H. to increase his honesty. "Student responded by completing all of his tasks without lying or attempting to lie to AT."[61] Mr. Grower's mileage log for December 20, 2008, does not include any student IDs. It states "Bragaw-rch vist-egan-82nd." "Bragaw" was ACS's new facility, into which it had just moved. "rch vist" references the Ft. Richardson visitor center, where students who lived on the Ft. Richardson army base were sometimes picked up. "[E]gan" references the Egan Center, which was a community location where interactive therapies could occur. The treatment parent progress note for December 20, 2008, notes that "[E.H.] had AT w/ Jerry this morning – They went to ROTC Community Service day at the Egan center where cadets were helping."[62] These documents provide strong evidence that the individual skill development session occurred outside the treatment foster home.

7. Claim 58, Line 12 (recipient initials D.U.). Activity Therapist Alycia Humecky provided individual skill development to D.U. on November 8, 2008, from 2:00 p.m. to 6:00 p.m. D.U.'s Objective #1 was to increase her "lady-like behavior" including "manners at the table, hygiene, bodily functions."[63] Objective #2 sought to increase age-appropriate social skills. Ms. Humecky's progress note for the November 8 therapy session states the following:

> [D.U.] and this writer addressed Obj. 1, 2 during session. Obj. 1 was complete AEB [D.U.] cleansing her face and brushing her hair at the beginning of the session with 1 prompt. [D.U.] also left the room for a bodily function. Obj. 2 was complete AEB. [D.U.] and this writer viewing a book about how to make friends and how to act in social situations. The plan for next session is to address the above objectives.[64]

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61 ACS Exhibit J (Record at 2306).

62 *Id.* (Record at 2307).

63 ACS Exhibit K (Record at 4853).

64 *Id.* (Record at 4583-54). The acronym "AEB" appears on many progress notes. From context it appears to mean "as evidenced by."

The progress note prepared by the treatment foster parent for November 8 includes the statement "assisted-coached [D.U.] on proper hygiene i.e. washing/brushing her hair."[65] The note acknowledges that therapy with an activity therapist occurred that day, but does not indicate where. Ms. Humecky's mileage log for November 8, 2008, has two entries, neither of which is cross-referenced to a student I.D. The second entry, which Ms. Nelsen testified was the one most likely to be the afternoon therapy for D.U., states "All-fired up, museum, ACS, home."[66] "All-fired up" is a ceramics studio where activity therapists would sometimes take students for therapy sessions.[67] In ACS's view, the mileage log indicates that the therapy with D.U. took place in the community at the ceramics studio, the museum, and the ACS facility. Ms. Nelsen noted that hygiene issues are common among children with autism or other behavioral/developmental problems. The ACS building included facilities for practicing hygiene skills.[68] ACS argued that the fact that both the treatment foster parent and the activity therapist practiced hygiene skills related to hair on the same day would not be unusual or indicate that the individual skill development session provided by the activity therapist occurred in the home. The Division, on the other hand, concluded that the two progress notes describing the same activity indicates that it was one hair brushing session that took place inside the home.

Either inference is possible. Here, however, the documents in the record present problems for ACS. First, both the treatment foster parent and the activity therapist worked with D.U. on brushing her hair. While of course it is possible that hair brushing occurred more than once, this evidence supports an inference that the hair-brushing session might have been one session, with both the activity therapist and the treatment foster parent working together in the home. Second, the treatment foster parent's progress note includes the words "assisted-coached" with regard to the hygiene session with D.U. involving her hair. The use of the word "assisted" in front of "coached" could mean that the treatment foster parent assisted the activity therapist who was coaching the session.[69] Because no evidence indicates that the treatment foster parent

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65 *Id*. (Record at 4855).

66 ACS Exhibit T at 6.

67 Nelsen testimony. Ms. Nelsen explained that the activity, such as doing ceramics (or other activities), is not the therapy—the therapy is the social interactions and the interventions that are provided by the therapist during the interaction.

68 *Id.*

69 The note "assisted-coached" could mean that the foster parent assisted and coached the child. Other entries, however, are not in that format. For example, the treatment foster parent progress note for November 3 states "coached/redirected D.U. on hygiene. Encouraged/communicated the importance of completing her

left the home with D.U., this session most likely occurred inside the foster treatment home. Third, it is difficult to marry the activity therapist's progress note to the mileage log. Although the activities in the progress note—face washing, hair brushing, hygiene, and reading a book—could occur at the ACS facility, they would be unusual activities for a ceramic studio or a museum, and nothing in the progress note indicates any therapy that could have occurred in the ceramics studio or museum. These activities, and especially hygiene, typically occur in the home. This mileage log, therefore, supplies little or no support for an inference that the individual skill development session referenced in the November 8 progress note occurred outside the home. In sum, the documents in this record make it more likely than not that at least some of the individual skill development delivered by the activity therapist to D.U. on November 8 occurred in the foster home, in spite of the fact that ACS had a rule against that practice. Accordingly, the Division has met its burden of proving that ACS did not retain the documents necessary to demonstrate that Claim 58 line 12 was compensable.

8. Claim 63, Line 9 (recipient initials R.W.). Activity Therapist Olivia Shears provided individual skill development to R.W. on March 29, 2008. Her progress note for that session notes that "[R.W.] and this writer processed [R.W.'s] feelings at CP."[70] Because "CP" is the ACS facility, the progress note (not the tertiary evidence) records the location of the services as being outside the treatment home. This service is compensable.

9. Claim 65 Line 1 (recipient initials J.Y.). Case Manager Mama Sisay provided family skill development to J.Y. and her foster treatment family on November 24, 2008, at 4:45 p.m. Ms. Sisay's mileage log for November 2008 includes 21 detailed entries. It does not include any entries for November 24th.[71] ACS argues that the absence of an entry on November 24th is evidence that the family skill development session occurred at the ACS facility. It believes that Ms. Sisay stayed at the facility and J.Y. and J.Y.'s foster parents came to the facility for the session. In addition, case managers are trained to write "N.B." under "units" if the family skill development occurred in the home. Ms. Sisay wrote "2," which, in ACS's view, shows that the session did not occur in the home. This evidence is ambiguous, however. The absence of a notation in a mileage log could be for any number of reasons, including forgetfulness or using

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homework." ACS Exhibit K (Record at 4846). Thus, although the November 8 entry is ambiguous, it provides some support for an inference that the foster parent was assisting the activity therapist on D.U.'s hair.

[70] ACS Exhibit L (Record at 5131).

[71] ACS Exhibit T at 8.

transportation other than a personal car. Mr. White acknowledged that family skill development (unlike individual skill development) does occur in the home. Although the therapists are trained to write "N.B." when the therapy occurs in the home, errors can occur and it is possible that Ms. Sisay made an error in writing "2" in the units box. In addition, the weekly summary report for J.Y. for the week of November 24 shows no therapy appointments for that week.[72] Although that evidence is also ambiguous in that "no" is a wrong answer whether the family skill development occurred in the home or at ACS, it does seem that if J.Y. and her treatment foster family had traveled for an appointment the foster parent would be more likely to record the therapy session in the weekly summary. Finally, the progress notes indicate that a second child was in the home. This too makes it slightly more likely that the family skill development session might have occurred in the home rather than at the ACS facility. Accordingly, the Division has met its burden of proving that ACS did not retain documents that prove that Claim 65, line 1 was compensable.

In sum, the following claims are compensable: Claim 3, Line 1; Claim 8, Line 2; Claim 14, Line 5; Claim 18, Line 1; Claim 23, Line 4; Claim 23, Line 8; and Claim 63, Line 9. The following claims are not compensable: Claim 58, Line 12; and Claim 65, Line 1.

IV. Conclusion

1. The Division's audit finding of overpayments for Alaska Children's Services 2008 claims that were not supported by progress notes are affirmed.
2. The Division's audit findings of overpayments for Alaska Children's Services 2008 claims Claim 3, Line 1; Claim 8, Line 2; Claim 14, Line 5; Claim 18, Line 1; Claim 23, Line 4; Claim 23, Line 8; and Claim 63, Line 9, are reversed.
3. The Division's audit findings of overpayments for Alaska Children's Services 2008 claims Claim 58, Line 12; and Claim 65 Line 1 are affirmed.

[72] *Id.* (Record at 5224). This claim is not identical to Claim 3, Line 1, where ACS's request to draw a negative inference from the mileage log was sustained. There, the mileage log showed that the case manager returned to the ACS facility from court. Also, that claim appears to be for individual skill development, which very rarely if ever occurs in the home. Family skill development, on the other hand, does occur in the home.

Based on this conclusion, and any agreements or concessions between the parties regarding contested audit findings, the Division should recompute its statistical extrapolation of the amount due. ACS may dispute that computation if ACS believes that the computation is incorrect.

DATED: January 31, 2014.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

Corrected Adoption

I adopt 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 as of this 21st day of March, 2014.

By: *Signed*
William J. Streur
Commissioner, Dep't of Health & Soc. Services

[This document has been modified to conform to the technical standards for publication.]