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

In the Matter of:	)	
	)	
S D, SR.	)	OAH No. 13-1398-MDE
	)	DPA Case No.

DECISION

I. Introduction

The issue in this case is whether the Division of Public Assistance (Division) was correct to set the amount of S D, Sr.'s cost-of-care or "COC," (basically, Mr. D's share of the cost of his Long-Term Medicaid benefits), at $748.00 per month effective October 1, 2013. The increase in Mr. D's COC resulted primarily from the Division's determination that Mr. D is no longer entitled to claim a dependent deduction for his youngest son, B H. D.

This decision concludes that the Division's decision was correct according to the Division's own (state) regulations and its policy manual. However, the Division's decision did not consider the federal Medicaid regulations pertaining to cost-of-care determinations. The federal cost-of-care regulations are more liberal, in the context of this case, than are the state cost-of-care regulations. To avoid federal preemption of the state cost-of-care regulations, the Division's regulations should be interpreted in harmony with the federal cost-of-care regulations. The federal cost-of-care regulations contain no requirement that a family member be claimable on the recipient's federal income tax return in order to qualify as a dependent. When the Division's cost-of-care regulation is interpreted in conformity with the federal cost-of-care regulations, B D qualifies as a "dependent child," and thus a "dependent family member," under the Division's regulations. Accordingly, the Division's decision setting Mr. D's cost-of-care contribution at $748.00 per month is reversed. Mr. D's dependent maintenance deduction is returned to its prior amount ($647.00 per month)[1] effective September 1, 2013. The Division shall recalculate Mr. D's cost-of-care contribution for the months in question using this dependent maintenance allowance figure, and issue Mr. D a new cost-of-care notice in conformity with this decision.

[1] Ex. 4.1.

II. Facts

A. Facts Relevant to Cost of Care Determination

The recipient in this case, S D, Sr., is the father of S D, Jr. and B H. D.[2] He is 53 years old, incapacitated, and currently lives in the No Name, a skilled nursing facility.[3] The monthly "private pay" cost of room and board at this facility is approximately $22,000.00.

Mr. D's son S is 23 years old, works as an Associate Real Estate Broker, and maintains his own household.[4] His younger brother B lives with him. Prior to June 2011 B lived with his father.[5] However, on June 3, 2011 Mr. D became physically and mentally incapacitated, and S subsequently took physical custody of B. This physical custody situation was formalized by an Anchorage Superior Court custody order issued on January 19, 2012. The court's order provides in relevant part that "[s]ole legal and physical custody of B D is awarded to S D, Jr.," and that "S D, Jr. shall . . . claim B as a dependent for income tax purposes."[6]

B is currently a high school senior and is active in high school sports.[7] He is also taking some college courses. He plans to attend college after he graduates from high school. He will be 18 years old in January 2014.

At some time between June 2011 and September 2013 S was appointed legal guardian of both his father and his brother B.[8] He receives their Social Security payments and applies that money to their respective expenses.

As of the date of the hearing B was receiving $349.00 per month in Social Security benefits as a result of Mr. D's disability.[9] This money, while helpful, only pays for about 75% of B's monthly food bill. S pays the balance of B's food costs, provides him with a place to live, and pays for his clothing, schools expenses, transportation, and incidentals.

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[2] S D, Jr. hearing testimony; Ex. 6.0. For the sake of simplicity, the recipient will be referred to as "Mr. D," S D, Jr. will be referred to as "S," and B D will be referred to as "B."

[3] Exs. 1, 6.0, S D, Jr.'s hearing testimony. The recipient was described at hearing as being in a vegetative state.

[4] All factual findings in this paragraph are based on S D, Jr.'s hearing testimony.

[5] All factual findings in this paragraph are based on Exs. 6.0, 6.1, and S D, Jr.'s hearing testimony.

[6] The Superior Court's order does not terminate Mr. D's parental rights. Accordingly, pursuant to A.S.25.20.030, Mr. D has the legal duty to support B until he reaches the age of 18. Likewise, under A.S.25.20.030, S (and, when he turns 18, B) have the duty to support Mr. D to the extent they are able to do so.

[7] All factual findings in this paragraph are based on S D, Jr.'s hearing testimony.

[8] Ex. 9, S D, Jr.'s hearing testimony. Pursuant to A.S.13.26.070, S is not, in his capacity as B's guardian, legally obligated to use his own funds for B's support. Similarly, pursuant to A.S.13.26.150(c), S is not, in his capacity as Mr. D's guardian, legally obligated to use his own funds for Mr. D's support.

[9] All factual findings in this paragraph are based on S D, Jr.'s hearing testimony.

S had net income of about $16,000.00 in 2011, $11,000.00 in 2012, and $60,000.00 in 2013.[10] Thus, his average income for the past three years has been about $29,000. S pays $1,250.00 per month in rent, and his monthly food bill for himself and his brother is over $500.00.

Mr. D's gross income is currently $948.00 per month.[11] When Mr. D's cost of care contribution was set at zero, S was able to use some of this money to satisfy his father's duty to support B. However, if Mr. D's cost of care contribution is set at $748.00 per month, this leaves only $200.00 per month. This last $200.00 goes toward Mr. D's personal needs allowance. This leaves nothing with which to pay Mr. D's support obligation for B.

B. Relevant Procedural History

Mr. D began receiving Medicaid benefits in August 2011, about two months after he became incapacitated.[12] Mr. D's Medicaid cost-of-care contribution was zero through December 2011, apparently because he was no longer working and he was not yet receiving any disability benefits.[13] However, in January 2012 Mr. D began receiving $932.00 per month in Social Security Disability Insurance (SSDI) from the Social Security Administration (SSA).[14] B began receiving $349.00 per month in benefits from SSA at about the same time.[15] Based on this income the Division calculated Mr. D's new cost-of-care contribution at $732.00 per month.[16] On March 2, 2012 the Division became aware of six uninsured medical expenses (UME) which should have been factored-in in determining Mr. D's cost-of-care contribution.[17] On March 7, 2012 the Division received a copy of Mr. D's 2010 federal income tax return in which B was claimed as a dependent.[18]

On July 23, 2013 a Medicaid renewal application was filed on behalf of Mr. D.[19] On July 25, 2012 the Division processed Mr. D's renewal application.[20] Based on the information provided, the Division applied a dependent family member deduction for B, retroactive to

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10 All factual findings in this paragraph are based on S D, Jr.'s hearing testimony.
11 All factual findings in this paragraph are based on S D, Jr.'s hearing testimony.
12 Ex. 1.
13 Ex. 2.0.
14 Ex. 2.1. The payment has recently been raised to $948.00 per month.
15 Ex. 3.4.
16 Ex. 2.1. The Division arrived at this figure by subtracting a $200.00 personal needs allowance from Mr. D's monthly SSDI payment of $932.00. No dependent deduction was given.
17 Ex. 2.2.
18 Ex. 3.2.
19 Ex. 3.1.
20 Ex. 3.0.

April 2012.[21] On July 26, 2012 the Division notified Mr. D that his cost-of-care contribution had been recalculated as zero due to the allowance of a dependent family member deduction for B and the allowance of a deduction for Mr. D's recent UME.[22]

On December 6, 2012 the Division recalculated Mr. D's cost-of-care contribution based on the increase of his monthly SSDI payment to $948.00.[23] On December 7, 2012 the Division notified Mr. D that a dependent family member deduction had once again been allowed for B and that his cost-of-care contribution had again been calculated as zero.[24]

On July 16, 2013 an Eligibility Review Form was submitted on behalf of Mr. D which indicated that B was not living in Mr. D's household.[25] On July 29, 2013 the Division received a copy of the Anchorage Superior Court custody order issued on January 19, 2012 which had given sole legal and physical custody of B to S and which required ("shall") that S "claim B as a dependent for income tax purposes."[26] Based on this information the Division concluded that its prior allowance of a dependent family member allowance for B had been in error, and that Mr. D's cost-of-care contribution should be recalculated, without that allowance, retroactive to April 2012.[27] This resulted in a cost-of-care "balance due" from Mr. D of $9,644.00.[28]

On July 30, 2013 the Division sent three separate notices to Mr. D; an additional notice was sent on August 23, 2013.[29] Cumulatively, the notices (1) explained that the Division had concluded that its prior allowance of a dependent family member allowance for B had been in error based on the Superior Court's order; (2) that Mr. D's cost-of-care contribution had been recalculated, without that allowance, retroactive to April 2012; (3) that, based on the new calculation, the Division was making an income adjustment of $9,644.00 for that period; (4) that this adjustment was being applied for September 2013, resulting in a cost-of-care contribution of $10,392.00 for that month; and (5) that Mr. D's monthly cost-of-care contribution for the remainder of the renewal period, beginning October 1, 2013, would be $748.00.[30]

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21 Ex. 3.0.
22 Ex. 3.3.
23 Exs. 4.0, 4.2.
24 Ex. 4.1.
25 Ex. 5.1.
26 Ex. 5.0.
27 Ex. 5.0. Pursuant to 7 AAC 100.570, "[a]t any time, the department may make a retroactive adjustment to a recipient's cost-of-care liability to compensate for a previously understated or overstated cost-of-care determination."
28 Ex. 5.0.
29 Exs. 5.2, 5.3, 5.4, 8.2.
30 Exs. 5.2, 5.3, 5.4, 8.2.

On September 27, 2013 S, through counsel, requested a hearing on his father's behalf to contest the Division's cost-of-care determination.[31] Mr. D's hearing was held on November 12, 2013. S appeared in person as his father's guardian and testified on his father's behalf. Attorney Ernest M. Schlereth appeared in person and represented S in his capacity as guardian for Mr. D. Public Assistance Analyst Jeff Miller participated in the hearing by phone and represented the Division. Division Eligibility Technician John Lawson testified by phone on behalf of the Division. The record closed at the end of the hearing.

III. Discussion

A. Overview of Relevant Medicaid Cost-of-Care Regulations

Pursuant to 42 U.S.C. § 1396a(a)(17)(B), when a state adopts a Medicaid medical assistance plan, it must, in determining Medicaid eligibility and/or the extent of benefits, take "into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of Health and Human Services], available to the applicant or recipient." On the other hand, the Medicaid program will not reimburse a state for an institutionalized Medicaid patient's care to the extent that the patient can contribute to the cost of his or her care.[32] Accordingly, under the Medicaid program a patient must contribute his or her income, minus certain allowances and deductions, toward his or her cost-of-care.[33]

A Medicaid provider who renders long-term care services to a recipient residing in a nursing facility is responsible for collecting from the recipient the amount identified by the department as the recipient's cost-of-care liability.[34] The Division will reduce its payment to a Medicaid provider by the amount of the recipient's cost-of-care liability, even if the recipient does not pay the cost-of-care liability to the Medicaid provider.[35] A recipient with a cost-of-care liability who does not pay the Medicaid provider is liable to that medical institution or home and community-based waiver services provider for the unpaid amount.[36]

Pursuant to 42 CFR 435.725(c)(3), 42 CFR 435.733(c)(3), and 42 CFR 435.832, a Medicaid recipient is entitled to claim, as a deduction from income when calculating cost-of-care, an amount for the "maintenance needs of the family." This deduction is provided to "an individual with a family at home," and must (1) be based on a reasonable assessment of the

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31 Ex. 9.
32 See discussion in *Torner by Torner v. State*, 399 N.W.2d 381 (Iowa 1987).
33 See 42 CFR 435.725, 42 CFR 435.733, and 42 CFR 435.832.
34 7 AAC 100.552(a).
35 7 AAC 100.552(a).
36 7 AAC 100.552 (c).

family's financial need; (2) be adjusted for the number of family members living in the home; and (3) not exceed the higher of the need standard for a family of the same size used to determine eligibility under the State's approved AFDC plan or the medically needy income standard established under § 435.811.

The state of Alaska has implemented the family maintenance allowance (described above) through its own regulations.[37] Pursuant to 7 AAC 100.562, the "dependent family member allowance" is defined and calculated as follows:

> (a) The dependent family member allowance is the amount of the recipient's income that, when combined with the dependent family member's own income, will bring the dependent family member's total gross income as close as possible to the maximum dependent family member allowance authorized under 42 U.S.C. 1396r-5(d)(1)(C) without exceeding that allowance. If the dependent family member is living with an individual other than the community spouse, the dependent family member allowance is determined by deducting the dependent family member's income from the Family Medicaid qualifying income standards under 7 AAC 100.190(a)(2).
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> (b) The dependent family member allowance may be increased by a decision under 7 AAC 49 or court order that a greater monthly amount is needed based on extreme financial duress of the dependent family member.[38]
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> (c) In this section "dependent family member" means a dependent child, as defined in 7 AAC 100.579, dependent parent, or dependent sibling of the long-term care recipient.[39]

As indicated by the above regulations, Alaska's dependent family member allowance is more restrictive than its federal counterpart (the family maintenance deduction) because, under the state regulations (7 AAC 100.579(2)), the "dependent child" must be claimed by the recipient or his/her spouse as a dependent for income tax purposes. The corresponding federal

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37 7 AAC 100.554(c)(3), 7 AAC 100.562.

38 Pursuant to 7 AAC 100.579(4), "extreme financial duress" is defined as when "the needs of the individual that are not normally associated with the basic living expenses of an individual living in that community would not be provided if not paid for by the individual, and if not provided would result in the individual being unable to live independently in the community."

39 Pursuant to 7 AAC 100.579(2), "dependent child" is defined as "the minor child of the recipient who lives with the community spouse and who may be claimed by either spouse as a dependent for income tax purposes." However, the Division's Aged, Disabled, and Long Term Care Medicaid Eligibility Manual provides, at Section 570(E), that "if a dependent child, dependent parent, or dependent sibling *is living with someone other than a community spouse*, the allowance is calculated by deducting the dependent's income from the Family Medicaid net income standard for a family of the same size" (emphasis added). Thus, the Division has, in its policy manual, interpreted a "dependent child" as including dependent children who (as here) do not live with any "community spouse." While the interpretation in the Division's policy manual is contrary to the plain language of 7 AAC 100.579(2), it is more consistent with the federal cost-of-care statutes and regulations in that it is "consistent with simplicity of administration and the best interests of the recipients" (42 U.S.C.A. § 1396a(a)(19)).

cost-of-care regulations, 42 CFR 435.725(c)(3), 42 CFR 435.733(c)(3), and 42 CFR 435.832, contain no such requirement.

B. The Federal and State Cost-of-Care Regulations are Inconsistent, but can be Reconciled

The Medicaid Act is a cooperative federal-state program that is jointly financed with federal and state funds.[40] Where (as with Medicaid) a state statutory scheme is to be administered in cooperation with and conform to a federal enactment, the state and federal statutes should be construed together, whenever possible, to maintain institutional harmony.[41]

The Department cannot set the state standards for the dependent family member allowance higher than federal law permits.[42] However, the standards specified by 7 AAC 100.562 and 7 AAC 100.579(2) (on one hand), and 42 CFR 435.725(c)(3), 42 CFR 435.733(c)(3), and 42 CFR 435.832 (on the other hand), are not far apart. It is possible to reconcile the state standards for the dependent family member allowance with that stated in the federal regulations by holding that 7 AAC 100.562 and 7 AAC 100.579(2) are preempted[43] by 42 CFR 435.725(c)(3), 42 CFR 435.733(c)(3), and 42 CFR 435.832, *but only to the extent that the state regulation requires that the recipient's dependent be claimed by the recipient* (or his/her spouse) *as a dependent for tax purposes*. Stated differently, 7 AAC 100.562 and 7 AAC 100.579(2) are not completely invalid, but rather are invalid only as applied to the facts of this particular case.[44]

In this case, the only reason the Division is currently denying Mr. D a dependent care deduction is that B is being claimed as a dependent for tax purposes by S instead of by Mr.

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[40] *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 501 (1990).

[41] *See generally* 2A C.D. Sands, *Sutherland Statutory Construction* § 51.06 (4th ed. 1973), *Ind. Commission v. Board of County Commissioners*, 690 P.2d 839, 844 (Colo. 1984), and *Sorlien v. North Dakota Workmen's Compensation Bureau*, 84 N.W.2d 575 (N.D. 1957).

[42] A state may not set a higher bar for Medicaid Program eligibility than that prescribed by the federal government. *Alexander v. Choate*, 469 U.S. 287, 289 n. 1 (1985).

[43] Federal agency regulations implementing federal statutes pre-empt state law under the Supremacy Clause. See U.S. Const., art. VI, § 2; *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958); *Free v. Bland*, 369 U.S. 663 (1962); *Paul v. United States*, 371 U.S. 245 (1963); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); Tribe, *American Constitutional Law* § 6-26, p. 481 (1988).

[44] An as-applied challenge goes to the nature of the application rather than the nature of the law itself. *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.1998); *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798, 805 (9th Cir.2007). A successful as-applied challenge does not render the law itself invalid, but only the particular application of the law. *Id.* Thus, statute or regulation may be invalid as applied to one set of facts, yet valid as applied to another. *Max Factor & Co. v. Kunsman*, 55 P.2d 177 (Cal. 1936). For an example of an Alaska Supreme Court decision invalidating a regulation as applied in a particular case, see *State of Alaska Public Employees' Retirement Board v. Morton*, 123 P.3d 986 (Alaska 2005).

D.[45] When the state regulations (and policy manual provisions) are interpreted in harmony with the federal cost-of-care regulations, this basis for denial is eliminated. When this basis for denial is eliminated, the dependent maintenance allowance once more becomes available and returns to its former amount of $647.00 per month.[46]

C. Alternatively, Mr. D's Monthly Cost-of-Care Contribution Should be Returned to $647.00 per Month Pursuant to 7 AAC 100.562(b)

Pursuant to 7 AAC 100.562(b), the dependent family member allowance may be increased by a fair hearing decision upon a finding that a greater monthly amount is needed based on extreme financial duress of the dependent family member. Based on the factual findings set forth in Section II(A) at pages 2-3 of this decision, the undersigned finds that it is necessary to return the dependent maintenance allowance to its former amount of $647.00 per month in order to avoid placing B under extreme financial duress.

IV. Conclusion

The Division's decision was correct according to the Division's own (state) regulations and its policy manual. However, the Division's decision did not consider the federal Medicaid regulations pertaining to cost-of-care determinations. The federal cost-of-care regulations are more liberal, in the context of this case, than are the state cost-of-care regulations. To avoid federal preemption of the state cost-of-care regulations, the Division's regulations must be interpreted in harmony with the federal cost-of-care regulations. The federal cost-of-care regulations contain no requirement that a family member be claimed on the recipient's federal income tax return in order to qualify as a dependent. When the Division's cost-of-care regulation is interpreted in conformity with the federal cost-of-care regulations, B D qualifies as a "dependent child," and thus a "dependent family member," under the Division's regulations. Accordingly, the Division's decision setting Mr. D's cost-of-care contribution at $748.00 per month is reversed. Mr. D's dependent maintenance deduction is returned to its prior amount ($647.00 per month) effective September 1, 2013. The Division shall recalculate

[45] *See* the Division's position statement at page 2; Exs. 5.0, 5.3, and 10; and the hearing testimony of Jeff Miller and John Lawson.
[46] Ex. 4.1.

Mr. D's cost-of-care contribution for the months in question using this dependent maintenance allowance figure, and issue Mr. D a new cost-of-care notice in conformity with this decision.

Dated this 7th day of January, 2014.

Signed
Jay Durych
Administrative Law Judge

Non-Adoption Options

D. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

Due to the court decision cited in the record, the son, B, is no longer a dependent of the Respondent and therefore the Respondent cannot claim a deduction for B as a dependent. Therefore the Division was correct in calculating the Respondent's cost-of-care contribution.

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 20th day of February, 2014.

By: *Signed*
Ree Sailors, Deputy Commissioner
Department of Health and Social Services

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