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

In the Matter of:	)	
	)	
K S	)	OAH No. 14-1158-MDE
	)	DPA Case No.

DECISION AND ORDER OF DISMISSAL

I. Introduction

The threshold issue in this case is whether K S requested a hearing regarding the termination of his Adult Public Assistance-related Medicaid within the time required by the applicable regulations. The Division of Public Assistance (DPA or Division) asserts that it provided proper notice of its determination to Mr. S, but that Mr. S failed to request a hearing on a timely basis, and therefore waived his right to a hearing on the merits of the Division's determination. This decision concludes, based on the preponderance of the evidence in the record, that Mr. S received proper notice of the Division's determination, but subsequently failed to request a hearing on a timely basis. On the facts of this case, there is no provision of law which would allow the administrative law judge (ALJ) to extend the period for the filing of Mr. S's hearing request. Accordingly, Mr. S is not entitled to a hearing on the merits of the Division's termination of his Medicaid benefits. The Division's prior decision terminating Mr. S's Medicaid benefits on the basis of excess resources therefore remains in effect without review by this Office, and this case is dismissed.

II. Facts

Mr. S is 82 years old.[1] His country of origin is Germany.[2] However, he has lived in Alaska since 1999 or before.[3] He currently lives at the No Name Senior Center.[4]

Mr. S is disabled and has, in recognition of this, received Adult Public Assistance (APA), and APA-related Medicaid, since November 1999.[5] He suffers from diabetes and hearing loss.[6] He also has dementia, which sometimes causes problems with his temper and mood.[7]

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1 Ex. 1.
2 Ex. E.
3 Ex. 1.
4 Exs. 2.18, 2.22.
5 Ex. 1.
6 Ex. E1.
7 Ex. E1.

On November 6, 2013 Mr. S submitted a Medicaid renewal application[8] Mr. S's application was approved by the Division on December 19, 2013.[9]

At about the same time, Mr. S began the process of applying for participation in the Medicaid Home and Community-Based Waiver Services (waiver services) program. On February 21, 2014 the Division of Senior and Disabilities Services (DSDS) determined that Mr. S requires the level of care provided by an intermediate level or skilled level nursing facility, and that he therefore satisfies the waiver services program's "level of care" (LOC) requirement.[10] On March 20, 2014 DSDS approved Mr. S's waiver services plan of care (POC).[11]

At that point, the only remaining prerequisite to Mr. S's participation in the waiver services program was proof of his satisfaction of the applicable financial criteria.[12] That portion of the application review process is performed by DPA rather than DSDS.[13]

On February 24, 2014, as part of its financial eligibility review, DPA mailed a form to Mr. S, on which he was to declare any assets he had transferred in the preceding five years.[14] The form instructed Mr. S to return it to DPA when completed, along with his bank statements for the last three months.[15]

As of March 21, 2014 the Division had not received the completed form and bank statements previously requested.[16] Accordingly, the Division mailed a follow-up / reminder notice to Mr. S on that date.[17]

As of April 11, 2014 the Division had still not received the completed form and bank statements originally requested on February 24th.[18] Accordingly, the Division mailed a second follow-up / reminder notice to Mr. S on that date.[19] This notice stated that, if the requested information was not received by April 29, 2014, Mr. S's application for waiver services would be denied.[20]

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8 Ex. 2.0.
9 Exs. 2.15, 19.12.
10 Ex. 3.
11 Ex. 5.
12 Ex. 6.
13 Jeff Miller's hearing testimony.
14 Ex. 4.
15 Ex. 4.
16 Ex. 6.
17 Ex. 6.
18 Ex. 8.
19 Ex. 8.
20 Ex. 8.

On April 17, 2014 the Division received a letter (with enclosures) from Mr. S's power-of-attorney holder L G.[21] However, these documents pertained to Mr. S's Senior Benefits Program case rather than his Medicaid case.[22]

On April 28, 2014 the Division received Mr. S's asset transfer declaration form and bank statements.[23] When the Division reviewed Mr. S's bank statements, it found that his bank account balances were greater than $2,000.00 during the months of February, March, and April 2014.[24] Accordingly, on April 29, 2014 the Division mailed a notice to Mr. S stating that his Medicaid coverage would end after May 31, 2014 because his total countable / nonexempt resources exceeded the Medicaid program's applicable maximum resource limit of $2,000.[25]

DPA subsequently informed DSDS that Mr. S's Medicaid coverage had been terminated.[26] Accordingly, on June 15, 2014, DSDS notified Mr. S that he would be disenrolled from the waiver services program on July 15, 2014.[27] On June 23, 2014 Ms. G submitted a hearing request on Mr. S's behalf.[28] It is not clear from that document whether Mr. S was contesting DPA's termination notice, DSDS' disenrollment notice, or both notices. On July 1, 2014 DSDS, which had assumed that Ms. G's hearing request pertained to its decision, referred this case to the Office of Administrative Hearings (OAH).

On July 22, 2014 a teleconference was held between a Division eligibility technician (ET), Ms. G, K N of No Name Hospital, and E O and L Q of Mr. S's assisted living home (ALH).[29] It was explained to the ET that the only reason Mr. S's bank account balance exceeded the Medicaid resource limit during the months at issue was because, due to computer, internet, and foreign bank transfer problems, Mr. S's monthly payments to the ALH were not debited from his account as scheduled.

On July 23, 2014 L L, Executive Director of No Name Agency, Inc. (No Name Agency), faxed a letter to the Division.[30] The letter explained that No Name Agency had been a victim of bank fraud in January 2014. In order to prevent further fraudulent activity, No Name Agency had been forced to close its bank account and open a new one. Because of this, it was necessary for Mr.

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21 Exs. 11.1 - 11.5.
22 Ex. 11.1.
23 Exs. 9.1 - 9.7. Mr. S's Senior Benefits renewal was approved on April 23, 2014 (Ex. 19.13).
24 Exs. 9.1 - 9.7.
25 Exs. 10, 12.2, 19.14.
26 Ex. D, Ex. 1916.
27 Ex. D, Ex. 19.16.
28 Ex. 19.17.
29 All factual findings in this paragraph are based on Ex. 17 unless otherwise stated.
30 All factual findings in this paragraph are based on Ex. 18 unless otherwise stated.

S, and O C, who handled Mr. S's financial affairs from Germany, to reconstruct the automatic bank transfers between an account in Germany, Mr. S's Alaska bank account, and the ALH's new bank account. While these arrangements were being made, money which would otherwise have been paid to the ALH each month instead accumulated in Mr. S's bank account.

Also on July 23, 2014 the Division received a letter, with supporting documentation, from Ms. G.[31] Ms. G's letter reiterated the banking problems referenced in Ms. L's letter, and requested that Mr. S's Medicaid benefits be retroactively reinstated. Enclosed with Ms. G's letter was a new, completed application for waiver services.[32] Finally, Ms. G's letter also enclosed a hearing request on Mr. S's behalf.[33] The hearing request stated that, had the ALH payments been made as intended, Mr. S's bank account balance would not have exceeded the $2,000.00 maximum resource limit. The hearing request further stated that automatic funds transfer provisions were now in place to prevent any recurrence.

OAH held a status conference on July 28, 2014. At that status conference it was determined that Mr. S was contesting DPA's decision, since it was DPA that originally terminated Mr. S's Medicaid coverage. Accordingly, DPA was joined as a party to the case, DSDS was dismissed from the case, and a hearing was scheduled for August 18, 2014.

On August 12, 2014 the Division filed a motion to dismiss Mr. S's case. The Division's motion was based on the assertion that Mr. S's hearing request was untimely.

Mr. S's hearing was held as scheduled on August 18, 2014. Mr. S did not participate but was represented by Ms. G. Ms. G, P Q, K N, and T R participated by phone and testified on Mr. S's behalf. L L and L V also participated by phone but did not testify. DPA Public Assistance Analyst Jeff Miller participated in the hearing by phone, represented the Division, and testified on its behalf. At the end of the hearing the record was closed and the case became ripe for decision.

III. Discussion

A. Overview of the Medicaid Program

The Medicaid program is an "entitlement program" created by the federal government, but administered by the states, to provide payment for medical services for low-income citizens.[34] People qualify for Medicaid by meeting federal income and asset standards and by fitting into a

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31 All factual findings in this paragraph are based on Exs. 19.1 - 21.28 unless otherwise stated.

32 Exs. 19.4 - 19.10.

33 All factual findings in this paragraph are based on Exs. 19.11 unless otherwise stated.

34 See State of Alaska Division of Health Care Services website at http://dhss.alaska.gov/dhcs/Pages/medicaid_medicare/default.aspx (date accessed September 16, 2014).

specified eligibility category.[35] In order to participate in Medicaid, federal law requires states to cover certain population groups (mandatory eligibility groups) and gives states the flexibility to cover other population groups (optional eligibility groups).[36]

One of the Medicaid eligibility categories available in Alaska is "Special Long Term Care" (SLTC) Medicaid.[37] SLTC is a species of Adult Public Assistance (APA) - related Medicaid.[38] APA-related Medicaid uses many (but not all) of the APA financial eligibility criteria (discussed below) for making APA-related Medicaid financial eligibility determinations.[39] APA-related Medicaid (in general), and SLTC Medicaid (in particular), are the Medicaid categories through which Mr. S previously received benefits.

Congress created the Home and Community-Based Waiver Services program to allow states to offer long-term care, not otherwise available through Medicaid, to serve recipients in their own homes and communities instead of in nursing facilities.[40] The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services.[41] Alaskans age 65 and over who qualify for APA-related Medicaid, and who require the level of care provided by a nursing facility, may qualify for additional Medicaid services under the Alaskans Living Independently (ALI) waiver.[42] Mr. S seeks Medicaid coverage of his assisted living home costs under the ALI waiver in this case.

B. Resource Eligibility Standards Applicable to APA-related SLTC Medicaid

APA-related Medicaid uses many of the Adult Public Assistance Program's financial eligibility criteria for making Medicaid financial eligibility determinations.[43] Among the Adult

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35 *Id.*

36 *See* the official Medicaid website at http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html (date accessed September 16, 2014).

37 *See* the Alaska Department of Health and Social Services' "Aged, Disabled and Long Term Care Medicaid Eligibility Manual" at Section 500(A), accessed online at http://dpaweb.hss.state.ak.us/manuals/adltc/adltc.Htm (date accessed September 16, 2014).

38 *Id.*

39 *See* 7 AAC 100.400.

40 *See* 42 USC 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR 440.180, titled "Home or Community-Based Services," provides in relevant part:

> (a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . . .

41 *See* 42 USC 1396n(c).

42 *See* the Alaska Department of Health and Social Services' "Aged, Disabled and Long Term Care Medicaid Eligibility Manual" at Section 560(B), accessed online at http://dpaweb.hss.state.ak.us/manuals/adltc/adltc.Htm (date accessed September 16, 2014).

43 7 AAC 100.400.

Public Assistance regulations used to make financial eligibility determinations for APA-related Medicaid are those concerning resources, resource limits, and excludable resources.[44]

Under 7 AAC 40.270, the APA-related Medicaid countable resource limit is $2,000.00 for an individual, and $3,000.00 for an individual living with a spouse, regardless of whether the spouse is otherwise eligible for assistance.[45] This standard applies to persons seeking payment of assisted living home costs under the ALI waiver.[46]

For purposes of APA-related Medicaid, "resources" are defined broadly by Alaska Medicaid regulation 7 AAC 40.260(a) as "any real or personal property that an applicant . . . owns and can convert to cash to be used for his or her support and maintenance."[47] The federal Medicaid regulation on which Alaska's regulation is based, 20 CFR § 416.1201, provides a bit more guidance and states in relevant part that "[i]f the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource."

There are a number of types of resources which are exempt (not countable) for purposes of determining the value of an individual's resources.[48] However, bank accounts are generally not exempt and are therefore countable for purposes of the Medicaid resource limit.[49]

If an individual has non-excludable resources that exceed the applicable resource limit at any time on the first day of a calendar month, the applicant is considered to be over-resource for that month.[50] Accordingly, if an individual's bank account balance exceeds $2,000.00 on the first day of the month, the individual is not financially eligible to receive Medicaid for that month.[51]

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[32] 7 AAC 40.260, 7 AAC 40.270, 7 AAC 40.280.

[45] *See also* the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 430-2 (stating that to be eligible for assistance, countable resources may not exceed $2000 for an individual, or $3000 for a couple, as long as at least one member is eligible for assistance), accessed online at http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm (date accessed September 16, 2014).

[46] *See* the Alaska Department of Health and Social Services' "Aged, Disabled and Long Term Care Medicaid Eligibility Manual" at Addendum 2, accessed online at http://dpaweb.hss.state.ak.us/manuals/adltc/adltc. Htm (date accessed September 16, 2014).

[47] *See also* the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Sections 430 - 431, accessed online at http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm (date accessed September 16, 2014).

[48] 7 AAC 40.280; *see also* the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 432, accessed online at http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm (accessed September 16, 2014).

[49] 7 AAC 40.280 ; *see also* the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 432, accessed at http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm (accessed September 16, 2014). Mr. S did not assert that any of the funds in his bank account fell within any exemption provided by statute or regulation.

[50] 7 AAC 40.270(b).

[51] There are no exceptions to this rule. The undersigned sympathizes greatly with the difficulties which caused Mr. S's account balance to exceed the $2,000.00 limit during the months at issue. The evidence indicates that the accumulation of funds in Mr. S's account was unintentional, and occurred despite reasonable efforts undertaken by those caring for him and assisting him with his affairs. However, it is undisputed that Mr. S's account balance did in fact exceed the $2,000.00 exemption limit during the months in question. Accordingly, even had Mr. S's hearing request

C. The Threshold Timeliness Issue

The timeliness of hearing requests in public assistance cases of this type is governed by Alaska "Fair Hearing" regulation 7 AAC 49.030. Pursuant to 7 AAC 49.030, a request for hearing must ordinarily be made "not later than 30 days after the date of the notice." The Department of Health and Social Services' regulation allows the consideration of a hearing request made *after* this time limit "only if the administrative law judge finds . . . that the request for a hearing *could not be filed* within the time limit" (emphasis added).[52] By its terms, this is an extremely narrow exception.

In this case, the preponderance of the evidence related to notice indicates as follows:

1. When Mr. S submitted his application for services dated November 6, 2013 he listed L C G as his authorized representative.[53] Ms. G's address was listed as P.O. Box 3364, No Name, Alaska.

2. On April 17, 2014 Ms. G filed a letter with the Division's No Name office which, among other things, reaffirmed that Ms. G is Mr. S's authorized representative for public assistance matters.[54]

3. On April 29, 2014 DPA sent a notice to Mr. S advising that his Medicaid benefits were being terminated because his bank account balance exceeded the Medicaid maximum resource limit.[55] This notice was sent to *Mr. S himself* at his residence address at 250 No Name Drive in No Name, Alaska. There is no indication in the record that Ms. G was sent a copy of this notice.

4. On June 15, 2014 the Division of Senior and Disabilities Services mailed a notice advising that, since DPA had terminated Mr. S's Medicaid eligibility, DSDS was terminating waiver services.[56] That notice was (properly) mailed to Ms. G at her No Name P.O. Box address.[57]

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been timely filed, the undersigned would have been required to affirm the Division's decision terminating Mr. S's Medicaid eligibility based on exceeding the $2,000.00 maximum resource limit.

[52] 7 AAC 49.030(a) (italics added).

[53] All factual findings in this paragraph are based on Ex. 2.11.

[54] Ex. 11.1.

[55] All factual findings in this paragraph are based on Exs. 10, 12.2, and 19.14.

[56] All factual findings in this paragraph are based on Ex. 19.16.

[57] Federal Medicaid law requires that Medicaid be administered by a single state entity. In Alaska, that entity is the Department of Health and Social Services (DHSS). When any subdivision of DHSS is notified that an individual has appointed an authorized representative, DHSS, including all its Divisions, are required to provide notice to the authorized representative.

5. Thus, the first / earliest notice actually sent to *Ms. G* advising that Mr. S's Medicaid coverage was being terminated was DSDS's notice dated June 15, 2014.[58]

6. Ms. G filed a hearing request on behalf of Mr. S at some time between June 23, 2014 and July 9, 2014, less than 30 days later.[59]

7. However, Ms. G testified at hearing that she found DPA's April 29, 2014 termination notice, which had been sent directly to Mr. S, while she was going through his mail. Ms. G testified that she found DPA's notice about a week or two after the date of the notice (*i.e.* by May 14, 2014 at the latest).

The foregoing facts were undisputed; the only dispute concerns the legal effect of the facts. The undersigned concludes that, *in the absence of actual notice to Ms. G* of DPA's termination of Mr. S's Medicaid, Ms. G's hearing request dated June 23, 2014 *would have been timely* under 7 AAC 49.030, because her hearing request was filed with DHSS within 30 days of the first notice *actually sent to Ms. G as Mr. S's authorized representative.* DPA's notice of April 29, 2014 was *initially ineffective* because it was not sent to Ms. G as authorized representative.

However, although DPA's notice of April 29, 2014 was not sent to Ms. G, she cured the Division's otherwise defective notice by finding the notice that DPA had sent to Mr. S while she was going through his mail. Under 7 AAC 49.030, Mr. S's hearing request was due within 30 days of April 29, 2014 (the date DPA mailed the termination notice). Thus, the hearing request was due filed by May 29, 2014. The only exception provided by 7 AAC 49.030 is for those cases where "the request for a hearing could not be filed within the time limit." In this case, Ms. G received actual notice of the Division's termination notice by May 14, 2014. This left her with about two weeks to file a hearing request. No evidence was presented to show that Ms. G was unable to file a hearing request by May 29, 2014; she simply did not do so until June 23, 2014 or later. Mr. S's hearing request must therefore be found to be untimely under 7 AAC 49.030.[60]

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[58] Ex. 19.16.

[59] Exs. 19.17, 19.18.

[60] The foregoing is in no way meant as a criticism of Ms. G or of any of the other individuals who have assisted Mr. S in his quest to obtain and retain Medicaid benefits. Ms. G cannot be blamed for misunderstanding the requirements of the Medicaid program. Judge Henry Jacob Friendly, who has been called one of the greatest Federal judges in the history of the Federal bench, referred to Medicaid as "a statute of unparalleled complexity." *See DeJesus v. Perales*, 770 F.2d 316, 321 (2d Cir.1985); *see also Friedman v. Berger*, 409 F. Supp. 1225, 1225–26 (S.D.N.Y.1976) (referring to Medicaid as " an aggravated assault on the English language, [resistant] to attempts to understand it"); *Cherry v. Magnant*, 832 F. Supp. 1271, 1273 n. 4 (S.D.Ind.1993) (Medicaid regulations "almost unintelligible to the uninitiated"); *West Virginia v. United States Department of Health and Human Services*, 289 F.3d 281, 294 (4th Cir. 2002) (stating that "the Medicaid Act is an enormously complicated program"); *Poindexter v. State ex rel. Department of Human Services*, 869 N.E.2d 139 (Ill. App. 4th Dist. 2006) (stating that "Medicaid law is extremely complicated" and that "interpretation of its provisions is fraught with difficulty"); *Stafford v. Idaho Department of Health* & Welfare, 181

IV. Conclusion and Order

In summary, the preponderance of the evidence indicates that Mr. S's authorized representative received actual notice of the Division's determination, but failed to request a hearing as to the Division's determination within the 30-day period specified by 7 AAC 49.030, under circumstances in which it was possible to submit a timely hearing request. The Division's request to dismiss this case must therefore be granted, and this matter is dismissed pursuant to 7 AAC 49.100(5).[61] Mr. S is, of course, free to contest any future Medicaid determinations that he may disagree with, as long as he requests a hearing on a timely basis.

Notice of Appeal Rights

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 18th day of September, 2014.

Signed
Jay Durych
Administrative Law Judge

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

P.3d 456 (Idaho 2008) (stating that the Medicaid system is "complicated, messy and tedious"); and *Stormont-Vail Regional Medical Center v. Sebelius*, 435 Fed. Appx. 738 (10th Cir. 2011) (referring to Medicaid as "immensely complicated").

[61] As discussed in footnote 51, above, even had Mr. S's hearing request been timely filed, the undersigned would have been required to affirm the Division's decision terminating Mr. S's Medicaid eligibility based on exceeding the $2,000.00 maximum resource limit.