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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
 [REDACTED],) OHA Case No. 09-FH-232
)
 Claimant.) Div. Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) requested that the Medicaid program pay for Intensive Active Treatment (IAT) services to be provided him by the [REDACTED]. The Division of Senior and Disabilities Services (Division) denied his request for these IAT services on March 25, 2009. (Ex. D) The Claimant requested a fair hearing contesting the denial on April 16, 2009. (Ex. C) This office has jurisdiction pursuant to 7 AAC 49.010.

The hearing was held on May 11 and July 13, 2009.

The Claimant is a minor. He did not appear at the hearing. [REDACTED], his mother and legal guardian, appeared in person on both hearing dates, represented his interests, and testified on his behalf. [REDACTED] from [REDACTED], a care provider for the Claimant, appeared in person on both hearing dates and testified on the Claimant's behalf.

[REDACTED], a Health Program Manager III employed with the Division of Health Care Services, appeared in person on both hearing dates and represented the Division. [REDACTED], a Health Program Manager II employed with the Division of Senior and Disabilities Services, appeared in person on both hearing dates and testified on the Division's behalf.

ISSUE

Was the Division correct when it denied the Claimant's request that the Division approve the following as part of his Plan of Care for the time period from November 11, 2008 through October 31, 2009:

1. One two week Intensive Treatment program held by the [REDACTED] in California.
2. Two days¹ of workshops/consultations held onsite (in Alaska) by the [REDACTED]

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. The Claimant is [REDACTED] years old (date of birth [REDACTED]). (Ex. E, p. 1) He receives Medicaid Home and Community Based Waiver services. (Ex. D, p. 1)
2. The Claimant has a primary diagnosis of Autism, along with secondary diagnoses of Attention Deficit/Hyperactivity Disorder, Obsessive/Compulsive Disorder, Profound Cognitive Delays, Intermittent Explosive Disorder, and Mood Disorder not otherwise specified. (Ex. E, p. 2)
3. The Claimant submitted a plan of care to the Division for the period from November 1, 2008 through October 31, 2009. (Ex. E, pp. 1 – 37) The plan of care requested, in pertinent part, that the Claimant receive services from the [REDACTED] consisting of both a two week intensive program conducted at the [REDACTED]'s clinic in California, and two days² of workshops/consultations to be held in Alaska. (Ex. E, p. 26)
4. Dr. [REDACTED], Ph.D., is one of the principals for the [REDACTED] program. (Ex. E, p. 41) He has been licensed as a psychologist in Alaska since May 30, 2008. (Ex. F, p. 7) The Claimant did not claim or argue that any of the other [REDACTED] personnel were professionally licensed in Alaska.
5. Dr. [REDACTED] supervises and consults with a team of professionals that would work directly with the Claimant during the two week intensive program held in California. (Ex. E, p. 45) Dr. [REDACTED] would not himself be providing the services during the two week intensive program held in California. (Ex. E, p. 45; [REDACTED] testimony)

¹ The original request was for four days of onsite workshops/consultations. (Ex. E, p. 26) However, at hearing, the Claimant's mother stated the request had changed to only two days of onsite workshops/consultations. ([REDACTED] statement)

² See Fn. 1 above.

6. Dr. ██████ would be directly providing the services during the two days of onsite workshops/consultations. (██████ testimony)

7. On March 25, 2009, the Division denied the Claimant's request for both the California two week intensive program and the two days of onsite workshops/consultations. (Ex. D) The Division's denial notice provided two reasons for the denial:

a. The services must be provided by an Alaska licensed professional. (Ex. D, p. 1) Dr. ██████, the Alaska licensed professional, will be supervising and consulting with the team providing the services, but he will not be the person providing direct treatment for the Claimant. (Ex. D, pp. 1 – 2)

b. The Claimant has not exhausted other resources available in the community before asking the Division to pay for the ██████ treatment. (Ex. D, p. 2)

8. At hearing, Ms. ██████, who is employed by the Division as a Health Program Manager II, clarified that the objection that the treatment would not be provided by Alaska licensed professionals only applied to the California two week intensive program, and not to the two day of onsite workshops/consultations. (██████ testimony)

9. At hearing, Ms. ██████ stated that failure of the Claimant to exhaust other community resources to pay for the ██████ treatment referred to the Claimant not exhausting school district resources to help pay for the treatment. (██████ testimony) This was the first time the Division notified the Claimant that the Claimant needed to exhaust school district participation in paying for the ██████ treatment before asking the Division for assistance. (██████ testimony)

10. On June 21, 2009, the Claimant's School District notified the Claimant's mother that it was only approving payment for a one week workshop rather than the two weeks requested. (Ex. G) That same notice informed the Claimant that the School District was approving payment for six one day workshops rather than the eight days requested. *Id.* The School District's agreement to pay for these services was the result of negotiations between the School District and the Claimant's mother. (██████ testimony)

11. The Claimant's mother testified she had received all the services she could receive through the School District. She stated she made a conscious choice to negotiate for the level of services rather than go through an adversarial due process hearing challenging her son's Individual Education Program with the School District because she felt going through the adversarial process against the School District would negatively impact the services he received from the School District. (██████ testimony) The Claimant's mother was credible. This credibility finding is based upon the mother's demeanor (calm, matter of fact, non-accusatory, fact specific) and her consistent factual testimony about her son's history of treatment with the School District.

PRINCIPLES OF LAW

This case involves the denial of an application for benefits. When an application is denied, the applicant has the burden of proof³ by a preponderance of the evidence.⁴

The Alaska regulation that authorizes the Medicaid program to pay for Intensive Active Treatment services reads, in pertinent part:

7 AAC 43.1048. Intensive active treatment services. (a) The department will reimburse for intensive active treatment services

(1) that are provided to a recipient in one of the following recipient categories:

* * *

(C) individuals with mental retardation or developmental disabilities;

. . .

(b) The department will consider services to be intensive active treatment services if

* * *

(3) the treatment or therapy is designed and provided by a professional licensed under AS 08 with expertise specific to the diagnosed condition, or by a paraprofessional licensed under AS 08 if necessary and supervised by that professional.

“AS 08” referred to in 7 AAC 43.1048(b)(3) refers to Title 8 of the Alaska Statutes, which lists the regulated occupations requiring a State of Alaska approved professional license before a person can engage in that field of work in the State of Alaska. *See AS 08.01.010 et. seq.*

The Alaska Medicaid regulations contain a provision requiring Medicaid recipients to exhaust community resources before the Alaska Medicaid program will pay for services:

³ “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

⁴ Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black’s Law Dictionary 1064 (5th Ed. 1979)

7 AAC 43.015. Alternate Resources. (a) The division will make payment only when other resources are not available to assume responsibility for the recipient's medical need. Full use must be made of alternate resources in the community.

ANALYSIS

The issue in this case is whether the Division was correct when it denied the Claimant's request that the Medicaid program pay for his Intensive Active Treatment Services. Because this is an application for services, the Claimant has the burden of proof by a preponderance of the evidence.

The pertinent facts in this case, which are not in dispute, are as follows:

1. The Claimant has requested that Medicaid pay for services to be provided by the [REDACTED].
2. The services consist of both a two week intensive workshop conducted in California by [REDACTED] staff, who will be supervised by and consult with Dr. [REDACTED], and two days of workshops/consultations conducted onsite (in Alaska) by Dr. [REDACTED]. Dr. [REDACTED] will not be providing direct services to the Claimant for the California workshop. *See* Finding of Fact 5 above. Dr. [REDACTED] will be providing direct services to the Claimant for the onsite workshops/consultations. *See* Finding of Fact 6 above.
3. Dr. [REDACTED] is the only [REDACTED] staff member licensed in Alaska.

In addition, there is one disputed fact, whether the Claimant has exhausted other available resources, specifically the School District, before asking the Medicaid program to pay for the [REDACTED] workshops. This disputed fact is resolved in favor of the Claimant. The Claimant's mother was found credible, and met her burden of proof on this issue, establishing that she had exhausted available School District resources. *See* Finding of Fact 11 above.

A. Intensive Two Week Program In California.

It is undisputed that Dr. [REDACTED] will not be providing direct services to the Claimant during the two week intensive program conducted in California. Instead, his role is as a supervisor and consultant to the treatment team. Dr. [REDACTED] is licensed in Alaska. His team members are not.

The Alaska Medicaid regulations require that Intensive Active Treatment services be provided "by a professional licensed under AS 08 with expertise specific to the diagnosed condition, or by a paraprofessional licensed under AS 08 if necessary and supervised by

that professional.” 7 AAC 43.1048(b)(3). This means that professionals who provide Intensive Active Treatment services must be licensed under AS 08, i.e. have an Alaska license to perform their specific profession. This also means that paraprofessionals who are supervised by the Alaska licensed professional must themselves have an Alaska license to perform their specific profession.

Because the Claimant’s two week intensive treatment program in California would be performed by [REDACTED] staff, who are themselves not licensed in Alaska, they do not satisfy the requirement that Intensive Active Treatment services be provided by Alaska licensed professionals or Alaska licensed paraprofessionals. Dr. [REDACTED]’s Alaska licensure does not satisfy this requirement: services must be directly provided by either Alaska licensed professionals or Alaska licensed paraprofessionals supervised by the Alaska licensed professional. 7 AAC 43.1048(b)(3).

The Claimant therefore has not met his burden of proof on this issue. Because Dr. [REDACTED] will not be providing direct services to the Claimant during the two week intensive treatment program, but rather supervising and consulting with a team who are not Alaska licensed professionals or Alaska licensed paraprofessionals, the Division was correct to deny approval for the Claimant’s request that Medicaid pay for a two week intensive treatment program in California.

B. Two Days of Onsite Workshops/Consultations

Dr. [REDACTED], an Alaska licensed psychologist, would be providing the treatment during the onsite workshops/consultations. At hearing, the Division’s witness, Ms. [REDACTED] stated that because Dr. [REDACTED] was licensed in Alaska, his licensure was not an issue. *See* Finding of Fact 8 above. This means that the only relevant issue is a factual one, whether the Claimant has exhausted community resources, specifically whether the School District would pay for the [REDACTED] workshops, instead of Medicaid.⁵

The Claimant’s mother testified on the issue of whether the Claimant had exhausted School District resources. She was found credible. She went through negotiations with the School District on what services the School District would provide her son, and she felt that she had received all the services she could from the School District. *See* Finding of Fact 11 above. For instance, she requested the School District pay for two weeks of California treatment and the School District approved one week. *See* Finding of Fact 10 above.

The Claimant therefore met his burden on the issue of whether he had exhausted other resources for his Intensive Active Treatment program request for two days of onsite

⁵ It should be noted that the Division only raised the generic issue of alternative resources in its March 25, 2009 denial notice. The first time the Division specifically identified the Claimant’s School District as the resource the Claimant was required to exhaust was at hearing. *See* Findings of Fact 7(b) and 9 above. This arguably violates the regulatory mandate that a denial notice “must detail the reasons for the proposed adverse action.” 7 AAC 49.070. However, because this Decision finds in the Claimant’s favor, the lack of full compliance is harmless error.

workshops/consultation before asking the Medicaid program to pay for this service. The Division was therefore not correct when it denied the Claimant's request that the Medicaid program pay for two days of onsite workshops/consultations to be provided by the [REDACTED].

CONCLUSIONS OF LAW

1. The Claimant did not meet her burden of proof by a preponderance of the evidence and prove that [REDACTED]'s proposed two week California intensive treatment for the Claimant satisfied the regulatory requirement that the treatment be conducted by Alaska licensed professionals and Alaska licensed paraprofessionals as required by 7 AAC 43.1048(b)(3).
2. The Division was therefore correct when it denied the Claimant's request that the Medicaid program pay for one two week Intensive Treatment program held by the [REDACTED] in California.
3. The Claimant met her burden of proof by a preponderance of the evidence and showed that she had exhausted alternative resources before requesting that the Medicaid program pay for 2 days of onsite workshops/consultations provided by the [REDACTED].
4. The Division was therefore not correct when it denied the Claimant's request that the Medicaid program pay for two days of consultations/workshops held onsite (in Alaska) by the [REDACTED].

DECISION

1. The Division was correct when it denied the Claimant's request that the Medicaid program pay for one two week Intensive Treatment program held by the [REDACTED] in California.
2. The Division was not correct when it denied the Claimant's request that the Medicaid program pay for two days of consultations/workshops held onsite (in Alaska) by the [REDACTED].

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Senior and Disabilities Services
Department of Health and Social Services
PO Box 110680
Juneau, AK 99811-0680

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

DATED this 15th day of September 2009.


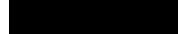
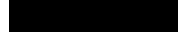
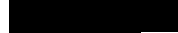
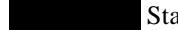
Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 15th day of September 2009, true and correct copies of the foregoing were sent to:

Claimant via USPS First Class Certified Mail, Return Receipt Requested.

And to the following by email:

, Hearing Representative
, Director
, Policy & Program Development
, Policy & Program Development
 Staff Development & Training

J. Albert Levitre, Jr., Law Office Assistant I