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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-440
)
 Claimant.) DPA Case No. [REDACTED]
)
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) was a recipient of Family Medicaid Program benefits (Ex. 1). On July 9, 2009 the Division mailed to the Claimant a notice stating that her Family Medicaid benefits would terminate at the end of July 2009 (Ex. 6). The Claimant requested a fair hearing on July 22, 2009 (Exs. 7.0 – 7.1). This Office has jurisdiction to resolve the dispute pursuant to 7 AAC 49.010.

On August 13, 2009 the Division notified the Claimant that the hearing regarding the termination of her Family Medicaid benefits would be held on September 29, 2009. A hearing was held as scheduled on September 29, 2009 before Hearing Officer Jay Durych. The Claimant attended the hearing telephonically, represented herself, and testified on her own behalf. [REDACTED], Public Assistance Analyst with the Division, attended the hearing in person and represented and testified on behalf of the Division. The parties' testimony was received and all exhibits submitted were admitted into evidence. At the end of the hearing the record was closed and the case was submitted for decision.

ISSUE

Was the Division correct to terminate the Claimant's Family Medicaid Program benefits effective July 31, 2009 based on the assertion that there was no longer an eligible / dependent child living in the Claimant's home?

FINDINGS OF FACT

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

1. The Claimant's household consists of four persons (Ex. 2.0). These are the Claimant, her husband, and her two sons (both born October "", 1990) (Ex. 2.0).
2. The Claimant's sons were born approximately 2.5 months premature (Claimant testimony). As a result, her sons have experienced learning delays. *Id.*
3. While the Claimant's sons were attending 7th grade at ██████ Middle School, their teacher was unable to give them the attention required as a result of their special needs (Claimant testimony). The Claimant's only alternative was to home-school her two sons. *Id.* The Claimant's sons were home-schooled from 7th grade through their junior year (11th grade). *Id.* They completed the last of their 11th grade coursework during the late summer of 2009. *Id.*
4. During the spring of 2009 the Claimant's sons enrolled in the ██████ Academy at ██████, Alaska (Claimant testimony). They are currently attending that Academy for their senior year (2009-2010). *Id.* They are scheduled to graduate from the Academy with their GED in March 2010. *Id.*
5. The Claimant's sons turned 19 years of age on October "", 2009 (Claimant testimony). They will not graduate from high school (the Academy) prior to their 19th birthday. *Id.*
6. The Claimant has 14 different health problems (Claimant testimony). Her prescription medications alone cost more than her family's gross monthly income. *Id.* The Claimant has coverage under the CAMA program, but CAMA only covers two (2) of the Claimant's 14 health problems, and the coverage provided by CAMA is limited. *Id.*
7. The Claimant has applied for federal Social Security disability benefits (SSI) (Claimant testimony). However, her lawyer advises her that it may be a year or so before she is approved and begins receiving those benefits. *Id.*
8. The Claimant believes that she will die as a result of her health problems if she does not have some form of medical coverage to pay for necessary prescription drugs and doctor appointments (Claimant testimony).
9. The Claimant was receiving Family Medicaid Program benefits as of June 10, 2009 (Ex. 1). On that date the Claimant signed an Eligibility Review Form (Form Gen-72) (Exs. 2.0 – 2.3). This form was submitted to the Division on June 12, 2009 (Ex. 2.0).
10. Notes on the Division's Eligibility Information System (EIS) dated June 19, 2009 state in relevant part as follows (Ex. 3.0 – 3.1):

The boys turned 18 in October 2008. Per HC school verification letter received August 19, 2008, both boys are home-schooled through ██████

██████████ School District, and they are expected to graduate in 2010 . . . Boys are not going to graduate before reaching 19, [so the Claimant] gets removed from Family Medicaid.

11. Notes on the Division's Eligibility Information System (EIS) dated July 8, 2009 state in relevant part as follows (Ex. 5):

The boys turn 19 in October 2009. Per HC school letter [the boys are] not going to graduate until 2010 after they turn 19, no medical coverage for [the Claimant after] July 31, 2009.

12. On July 9, 2009 the Division mailed to the Claimant a notice titled "Medicaid Benefits Change" which informed the Claimant that her Medicaid coverage would end after July 31, 2009 (Ex. 6.0). The notice stated in relevant part as follows:

5185 is the [Family] Medicaid Manual Section which supports this action [Claimant], you are no longer eligible to participate in the Family Medicaid Case per Family Medicaid Manual Section 5013-C1. Per school verification letter received August 19, 2008 the boys are expected to graduate in 2010 after they reach age 19. They remain eligible but your coverage ends at the end of July 2009.

13. On July 22, 2009 the Claimant requested a hearing regarding the Division's termination of her Family Medicaid benefits (Exs. 7.0 – 7.1).

14. The Division does not dispute the validity of the Claimant's sons' home-school program (Division hearing representative testimony).

15. The Claimant's two sons remain eligible for Medicaid under the Denali KidCare Program (Division hearing representative testimony).

16. The Claimant remains eligible for the CAMA (Chronic and Acute Medical Assistance) Program (Division hearing representative testimony).

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's termination of existing benefits. The party seeking a change in the status quo normally has the burden of proof.¹ In this case the Division is attempting to change the status quo or existing state of affairs by terminating existing benefits. Accordingly, the Division bears the burden of proof in this case.

¹ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the “preponderance of the evidence” standard is the standard of proof applicable to this case.² This standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.³

II. The Medicaid Program – In General.

Medicaid was established by Title XIX of the Social Security Act in 1965 to provide medical assistance to certain low-income needy individuals and families. 42 USC § 1396 et. seq. Medicaid is a cooperative federal-state program that is jointly financed with federal and state funds. *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 501, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

On the federal level, the Secretary of the U.S. Department of Health and Human Services (“HHS”) administers the program through the Health Care Financing Administration (“HCFA”). In Alaska, the Department of Health and Social Services administers the Medicaid program in accordance with applicable federal and state statutes and regulations.

Because Medicaid is a federal program, many of its requirements are contained in the Code of Federal Regulations (CFRs) at Title 42, Part 435 and Title 45, Part 233. The Medicaid program’s general eligibility requirements are set forth at 42 CFR Sections 435.2 – 435.1102.

The State of Alaska’s statutes implementing the federal Medicaid program are set forth at A.S. 47.07.010 – A.S.47.07.900. The State of Alaska’s regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapters 43 and 100.

III. Family Medicaid.

The Medicaid program has a large number of eligibility groups because it covers needy individuals in a variety of circumstances. See 7 AAC 100.002. One of the Medicaid program’s eligibility groups provides medical coverage for financially eligible households that include minor children. See 7 AAC 100.002(a)(1)(B); 7 AAC 100.100. This particular type of Medicaid coverage is known as Family Medicaid. *Id.*

Pursuant to 7 AAC 100.104, certain persons must be included within a Family Medicaid household in order for that household to be eligible for benefits. Where a household consists of a parent or caretaker relative and one or more dependent children, the dependent child or children

² A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

³ *Black’s Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); see also *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003) (“Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true”).

must be living in the home of the parent or caretaker relative in order to maintain Family Medicaid eligibility. 7 AAC 100.104(a); 7 AAC 100.110(a).

Pursuant to 7 AAC 100.104(a)(1), to be considered a dependent child, an individual must (among certain other requirements) be “under 18 years of age; or . . . under 19 years of age and enrolled full-time in a secondary school or in the equivalent vocational or technical training . . . “

Section 5013 C of the Alaska Family Medicaid Eligibility Manual provides in relevant part as follows:

* * * * *

Except as provided below, a dependent child must be under the age of 18 to qualify for Family Medicaid. Eligibility continues through the month in which the child reaches age 18.

A child who is age 18 meets the age requirement as a dependent child if the 18 year old:

Is enrolled full-time in a high school or *GED* program, or a high school or *GED* correspondence course *and is expected to graduate in or before the month of his or her 19th birthday*; or

Has not completed high school or a *GED* and is enrolled full-time in a course of study in a vocational or technical training program which will lead to a high school diploma or *GED and is expected to complete the course of study in or before the month of his or her 19th birthday*. [Italics added].

The caseworker must verify the 18-year-old's full-time enrollment and his or her expected date of course completion. The date of completion is the date of the last class or of the last examination, whichever occurs later. Full-time enrollment is defined by the school. Summer vacations are considered part of the school year. [Italics added].

In the case of a student enrolled in a vocational or technical training course, the course will be considered to meet this requirement if the school confirms that the student is enrolled full-time and that he or she will receive a certificate equivalent to a *GED* or high school diploma upon completion.

It is not necessary to verify actual attendance for purposes of this requirement; a child who is enrolled meets the requirement, regardless of actual attendance.

Eligibility ends effective (whichever occurs first): [1] The last day of the month of course completion, [2] Withdrawal of the child from enrollment, or [3] *The child's 19th birthday*. [Italics added].

* * * * *

The Claimant's eligibility for Family Medicaid coverage thus required her to have a "dependent child" in her home pursuant to 7 AAC 100.104(a) and Section 5013 C of the Alaska Family Medicaid Eligibility Manual. Without a "dependent child" in her home, the Claimant is not eligible for Family Medicaid benefits.

IV. Where Regulations Conflict With Agency Interpretations or Policy Manuals.

An agency's interpretation of its own regulation is reviewed under the reasonable basis standard; the agency's interpretation is deferred to unless the interpretation is "plainly erroneous and inconsistent with the regulation." *Lauth v. State*, 12 P.3d 181, 184 (Alaska 2000). A deferential standard of review for an agency's interpretation of its own regulation is only required when the "administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act." *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971). An agency interpretation of a regulation that supplements, revises, or makes a regulation more specific, is itself a regulation, and in order to be followed it must first be adopted pursuant to the Administrative Procedure Act. *Jerrel v. State, Dept of Natural Resources*, 999 P.2d 138, 144 (Alaska 2000) (rehearing denied).

Interpretations such as those in agency manuals lack the force of law. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). *See also Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 at 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995) (definition in HHS's Medicare Provider Reimbursement Manual "is a prototypical example of an interpretive rule" and therefore "do[es] not have the force and effect of law and [is] not accorded that weight in the adjudicatory process"); *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000) (an agency policy manual, such as the Commissioner's Hearing, Appeals and Litigation Law Manual ("HALLEX"), unlike the Code of Federal Regulations, "is strictly an internal guidance tool, providing policy and procedural guidelines to ALJs and other staff members," and, "[a]s such, it does not prescribe substantive rules and therefore does not carry the force and effect of law"); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748, 124 S.Ct. 2230, 159 L.Ed.2d 46 (2004) (an agency's internal guidelines and manuals do not have the equivalent force of law as a federal statute or regulation).

ANALYSIS

I. Introduction: Definition of Issue; Burden of Proof.

The issue to be determined is whether the Division was correct to terminate the Claimant's Family Medicaid Program benefits effective July 31, 2009 based on the assertion that there was no longer an eligible / dependent child living in the Claimant's home. To determine this issue it is necessary to apply the definitions for "eligible" or "dependent" child set forth in the relevant regulation and policy manual sections (7 AAC 100.104(a)(1) and Alaska Family Medicaid Eligibility Manual Section 5013 C) to the facts of this case, which are essentially undisputed.

Because the Division is the party attempting to change the status quo, the Division bears the burden of proof (see Principles of Law at page 4, above).

II. Was The Division Correct To Determine That The Claimant's Two Sons Are No Longer Dependent Children?

Where (as here) a household consists of a parent or caretaker relative and one or more children, at least one "dependent child" must be living in the home of the parent or caretaker relative in order to maintain Family Medicaid eligibility. 7 AAC 100.104(a); 7 AAC 100.110(a). Accordingly, the issue to be determined is whether the Claimant had at least one "dependent child" living in her home at the time the Division's eligibility determination was made.

The Claimant's household consists of four persons (Ex. 2.0). These are the Claimant, her husband, and her two sons (both born October █, 1990) (Ex. 2.0). At the time the Division's final eligibility determination was made on or about July 9, 2009 (Ex. 6.0) the Claimant's two sons were both 18 years of age. Thus, the Claimant's sons did not turn 19 until three months after the Division's eligibility determination was made.

In order to be considered a "dependent child" for purposes of the Family Medicaid Program, the relevant regulation requires that the child be "under 18 years of age; or . . . under 19 years of age and enrolled full-time in a secondary school or in the equivalent vocational or technical training . . . ". See 7 AAC 100.104(a).

The Claimant's two sons are both 18. Accordingly, they can only be classified as "dependent children" under 7 AAC 100.104(a) if they are "enrolled full-time in a secondary school or in the equivalent vocational or technical training." If they are in fact "enrolled full-time in a secondary school or in the equivalent vocational or technical training," then they would remain eligible, under the regulation, until their 19th birthday (i.e. until October █, 2009).

It was not disputed that the Claimant's two sons were "enrolled full-time in a secondary school or in the equivalent vocational or technical training" *at the time the Division's Family Medicaid eligibility determination was made* on July 9, 2009. Accordingly, *pursuant to 7 AAC 100.104(a)*, the Claimant's two sons were "dependent children" as of the date of the Division's eligibility determination, and they remained "dependent children" until their 19th birthday on October █, 2009.

The Division, however, relied on Section 5013 C of the Alaska Family Medicaid Eligibility Manual (AFMEM) in determining that the Claimant's two sons were no longer "dependent children." AFMEM Section 5013 C differs from 7 AAC 100.104(a) in that it adds the requirement that the child be "*expected to graduate in or before the month of his or her 19th birthday.*"

It was not disputed that the Claimant's two sons will not graduate until the spring of 2010, well after their 19th birthday. Accordingly, *pursuant to AFMEM Section 5013 C*, the Claimant's two sons were not "dependent children" as of the date of the Division's eligibility determination because they were not "*expected to graduate in or before the month of [their] 19th birthday.*"

As demonstrated above, the Claimant's two sons qualified as dependent children under the relevant regulation (7 AAC 100.104(a)), but did not qualify as dependent children under AFMEM Section 5013 C. How are these conflicting results to be resolved?

Initially, AFMEM Section 5013 C is not a regulation and therefore does not have the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *see also Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 at 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995); *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000); and *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748, 124 S.Ct. 2230, 159 L.Ed.2d 46 (2004). However, because it is the Division's *interpretation* of its own regulation (7 AAC 100.104(a)), a policy manual provision such as AFMEM Section 5013 C must be followed if it is a *reasonable interpretation* of a statute or regulation (*Lauth v. State*, 12 P.3d 181, 184 (Alaska 2000)).

As discussed above, AFMEM Section 5013 C is inconsistent with 7 AAC 100.104(a) because it adds the requirement that the child be "*expected to graduate in or before the month of his or her 19th birthday.*" This is not a case in which the policy manual provision explains or "fills a gap" left by the regulation; the regulation is clear and unambiguous on its face. Rather, *AFMEM Section 5013 C adds an entirely new additional requirement to those provided in the regulation.* For this reason, AFMEM Section 5013 C is not a reasonable interpretation of 7 AAC 100.104(a) and therefore need not be deferred to here. *Lauth v. State*, 12 P.3d 181, 184 (Alaska 2000).

Further, an agency interpretation of a regulation that supplements, revises, or makes a regulation more specific is itself a regulation, and in order to be followed it must first be adopted pursuant to the Administrative Procedure Act. *Jerrel v. State, Dept of Natural Resources*, 999 P.2d 138, 144 (Alaska 2000) (rehearing denied). Although AFMEM Section 5013 C supplements, revises, and makes 7 AAC 100.104(a) more specific, it has not been adopted as a regulation pursuant to Alaska's Administrative Procedures Act (APA). Accordingly, AFMEM Section 5013 C is essentially an illegal regulation because it adds new substantive requirements to existing regulations, without itself having first been properly adopted pursuant to the APA.

In summary, AFMEM Section 5013 C is inconsistent with 7 AAC 100.104(a) because it adds the requirement that the child be "*expected to graduate in or before the month of his or her 19th birthday.*" The definition of "dependent child" contained in 7 AAC 100.104(a) therefore takes precedence. The Claimant's two sons met the definition of "dependent child" contained in 7 AAC 100.104(a) at the time the Division's eligibility determination was made. Accordingly, the Division erred when it determined that there was no longer an eligible / dependent child living in the Claimant's home at the time the Division's final eligibility determination was made on or about July 9, 2009. The Division was therefore not correct when it terminated the Claimant's Family Medicaid Program benefits effective July 31, 2009.

CONCLUSIONS OF LAW

1. The Division did not carry its burden and did not prove, by a preponderance of the evidence, that there was no longer an eligible / dependent child living in the Claimant's home at the time the Division's final eligibility determination was made on or about July 9, 2009.

2. The Division was therefore not correct when it terminated the Claimant's Family Medicaid Program benefits effective July 31, 2009.

DECISION

The Division was not correct when it terminated the Claimant's Family Medicaid Program benefits effective July 31, 2009.

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 Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

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 _____ day of October, 2009.

_____/s/_____

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of October 2009 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
_____, Director
_____, Policy & Program Development
_____, Administrative Assistant II
_____, Eligibility Technician I
_____, Staff Development & Training
_____, Fair Hearing Representative

J. Albert Levitre, Jr.

Law Office Assistant I