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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. 11-FH-8
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) has received Adult Public Assistance (APA) benefits, and APA-related Medicaid benefits, since April 2002 (Ex. 1). The Claimant has also received Supplemental Security Income (SSI) from the United States Social Security Administration (SSA) since at least December 2005 (Ex. 2.1).

On December 9, 2010 the State of Alaska Department of Health and Social Services, Division of Public Assistance (DPA or Division) mailed a notice to the Claimant stating that his Adult Public Assistance (APA) benefits, and his APA-related Medicaid benefits, were being terminated after December 31, 2010 (Ex. 3).¹ On January 4, 2011 the Claimant requested a hearing with regard to the Division's termination of his APA and APA-related Medicaid benefits (Ex. 4).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

The Claimant's hearing was held on April 6, 2011 before Hearing Examiner Jay Durych. The Claimant was represented by attorney [REDACTED], Esq. of Alaska Legal Services Corporation; she participated in the hearing by telephone. The Claimant also participated by telephone; he listened but did not testify. [REDACTED], a 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.

The hearing record was left open through April 20, 2011 to allow the parties to submit post-hearing briefs. The Claimant submitted a post-hearing brief on April 20, 2011. The Division submitted a post-

¹ It was unclear from the notice as to whether the Claimant's benefits (1) were being automatically terminated because SSA had terminated the Claimant's SSI; or (2) were being terminated based on the assertion that the value of the Claimant's resources exceeded the APA and APA-related Medicaid Programs' applicable maximum resource limits (Ex. 3).

hearing brief on April 21, 2011.² After April 21, 2011 the record was closed and the case became ripe for decision.

ISSUES

The Claimant's counsel's argument was essentially as follows: There is no question that SSA has found the Claimant to be over-resource. On the merits, the Claimant asserts he is not over-resource, and that SSA's determination is mistaken. However, if SSA finds an SSI recipient to be over-resource, then, pursuant to the applicable regulations, the Division is bound to terminate the recipient's APA and APA-related Medicaid benefits (hearing recording at 8:25 – 8:32). Thus, counsel stated, "this decision [i.e. the decision as to eligibility for APA and APA-related Medicaid] hinges on their [SSA's] decision."

The Division's Representative also confirmed that the ultimate issue to be resolved is whether the Division was correct to terminate the Claimant's APA and APA-related Medicaid benefits based on SSA's termination of the Claimant's SSI benefits (hearing recording at 4:38 – 4:45).

However, at the hearing, the Hearing Examiner raised the issue of the legal sufficiency of the Division's benefit termination notice (Ex. 3). Accordingly, the issues to be determined are:

1. Was the Division's case closure / benefit termination notice dated December 9, 2010 (Ex. 3) legally sufficient to terminate the Claimant's Adult Public Assistance (APA) benefits and/or APA-related Medicaid benefits?
2. If not, was the insufficiency of the Division's notice cured by subsequent notices or events?
3. If so, was the Division correct to terminate the Claimant's Adult Public Assistance and/or and APA-related Medicaid benefits based on the Social Security Administration's termination of the Claimant's Supplemental Security Income (SSI) benefits?

SUMMARY OF DECISION

The Division's benefit termination notice dated December 9, 2010 did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070, or applicable decisions of the Alaska Supreme Court, (including *Allen v. State*), with regard to termination of the Claimant's Adult Public Assistance benefits.

The Division's benefit termination notice dated December 9, 2010 likewise did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070, federal Medicaid regulation 42 CFR 431.210(a), or applicable decisions of the Alaska Supreme Court (including *Allen v. State*), with regard to termination of the Claimant's APA-related Medicaid benefits.

² The Division's post-hearing brief was submitted one day late. However, the Claimant did not move to strike the Division's brief on that basis. Also, the Division's brief did not raise any new issues, and it does not appear that accepting the Division's late-filed brief would prejudice the Claimant in any way. Accordingly, the Division's late-filed brief is accepted.

Pursuant to the Alaska Supreme Court's decision in *Allen v. State*, these notice deficiencies can be cured by re-noticing the Claimant. However, the Claimant has not yet been adequately re-noticed in this case. Accordingly, the Division was not correct when, on December 9, 2010, it notified the Claimant that it would terminate his Adult Public Assistance and APA-related Medicaid benefits after December 31, 2010.

FINDINGS OF FACT

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

1. The Claimant has received Adult Public Assistance (APA) benefits, and APA-related Medicaid benefits, since April 2002 (Ex. 1). The Claimant has also received Supplemental Security Income (SSI) from the United States Social Security Administration (SSA) since at least December 2005 (Ex. 2.1).
2. On December 8, 2010 the Division received an alert, via its Electronic Information System (EIS) interface with the Social Security Administration's SSI, that the Claimant's SSI payments had been terminated due to "excess resources" (Ex. 2.0).
3. On December 9, 2010 the Division mailed a notice to the Claimant, titled "APA Closed – Over Resource," stating that his Adult Public Assistance and APA-related Medicaid benefits were being terminated (Ex. 3). The notice stated in relevant part as follows:

We closed your Adult Public Assistance (APA) case because your countable resources are over the APA program limit. You will not receive an APA payment after December 31, 2010.

\$3,000.00 is the APA resource limit for your household. UNKNOWN is the amount of your countable resources.

The resources we counted are listed at the bottom of this notice.

Medicaid benefits will also stop after the above date unless you are receiving Supplemental Security Income (SSI) benefits. If you receive SSI, your Medicaid will continue.

You may reapply for APA at any time with a new application.

This action is supported by APA Manual Section 430-2.

Resources we counted: Our office has been advised by the Social Security Administration that your SSI has stopped because you and your spouse's total countable resources have exceeded the SSI program resource limits. Public Assistance policies mirror those of Social Security with regard to SSI. If Social Security has determined that you are not resource eligible for SSI then you can no longer be resource eligible for APA [cash assistance] and APA-related Medicaid. If this decision has been made in error then please contact me before the end of December 2010. Be prepared to provide information and verification about what resources [SSA] is counting to determine [that] you [are] ineligible for SSI

4. A printout dated January 4, 2011 from the Division's Electronic Information System (EIS) interface with the Social Security Administration's SSI database indicates that, as of that date, the status of the Claimant's SSI payments was "non pay / excess resources" (Exs. 2.1, 2.2).

5. On January 7, 2011 the Division mailed a "Notice of Scheduled Telephone Fair Hearing" to the Claimant (Ex. 13). This notice identified the basis of the Division's closure of the Claimant's APA and Medicaid cases as "[c]lient's case closed due to he was over resources" (Ex. 13).

6. A Division case note dated January 7, 2011 (Ex. 5) indicates that on that date the Claimant's wife telephoned the Division to inquire as to why Adult Public Assistance benefits had ended. The case note indicates that the Division representative explained that APA "stopped because SSI ended," and that "once [things were] cleared up with SSI [then] APA can reopen" (Ex. 5).

7. On January 28, 2011 the Claimant filed a request that SSA reconsider its termination of his SSI (Ex. C-11).³ SSA denied the Claimant's request for reconsideration on March 5, 2011 (Exs. C-11 – C-12). The Claimant subsequently requested reconsideration again; this second reconsideration request was pending at the time of the hearing in this case (representation by Claimant's counsel).

8. The Division's Fair Hearing Position Statement dated February 8, 2011 states as follows at page 2, paragraph 5:⁴

On January 7, 2011 the agency conducted a prehearing conference with [the Claimant's wife]. The agency representative explained Social Security closed the SSI case for being over resources. The agency has to follow SSI regulations, so it had to close the APA/[Medicaid] case. It was explained [that] once they clear the problem up with the Social Security office, APA can be looked at again

9. On April 12, 2011, five days after the hearing held in this case, the Division mailed a revised termination notice to the Claimant (Ex. 11). The notice was identical to the Division's prior notice dated December 9, 2010 (Ex. 3), except that it added the following with regard to the Division's termination of the Claimant's Medicaid benefits:

This action is supported by [the Medicaid] Aged, Disabled, and Long Term Care Manual Section 524; 7 AAC 100.400; and 7 AAC 100.410.

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 bears the burden of proof.⁵ In this case the Division is attempting to change the

³ The exhibits filed by the Claimant are denominated "C-1," "C-2," etc. All exhibit numbers *not* preceded by "C-" were filed by the Division.

⁴ The Division's Fair Hearing Position Statement was admitted into evidence, on the Division's motion, during the hearing.

status quo or existing state of affairs by terminating pre-existing benefits. Accordingly, the Division bears the burden of proof in this case.

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.⁶ 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.⁷

II. The Adult Public Assistance Program – In General.

The Adult Public Assistance Program was established to furnish financial assistance to needy aged, blind, and disabled persons and to help them attain self-support or self-care. See A.S. 47.25.590(b); see also DPA website at <http://health.hss.state.ak.us/dpa/programs/apa/> (date accessed July 31, 2009). People who receive Adult Public Assistance are over 65 years old or have severe and long term disabilities that impose mental and physical limitations on their day-to-day functioning. *Id.*

III. 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.* It 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 Medicaid through the Centers for Medicare and Medicaid Services (“CMMS”). 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.

In Alaska, the State Department of Health and Social Services, Division of Health Care Services (DHCS), administers the Medicaid program in accordance with applicable federal and state laws and regulations. While DHCS is responsible for Medicaid program and policy development, the Division of Public Assistance (DPA) is responsible for determining eligibility for Medicaid benefits. *Id.* 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. Alaska’s regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapters 43 and 100 *et. seq.*

IV. Notice Requirements Applicable to the Adult Public Assistance and Medicaid Programs.

The State of Alaska Department of Health and Social Services’ “Fair Hearings” regulations apply to both the Adult Public Assistance Program and the Medicaid Program. See 7 AAC 49.010(a). Alaska

⁵ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁶ 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).

⁷ *Black’s Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979).

“Fair Hearings” regulation 7 AAC 49.070 provides in relevant part that, “[u]nless otherwise specified in applicable federal regulations, written notice to the client must detail the reasons for the proposed adverse action, *including the statute, regulation, or policy upon which that action is based.*” [Emphasis added].

Federal Medicaid regulation 42 CFR 431.210(a) requires that notices issued in the administration of the federal Medicaid program which involve the suspension, reduction, or termination of benefits provide (1) a statement of what action the department intends to take; (2) the reasons for the action; (3) *the specific regulation that supports the action*; (4) an explanation of the individual's right to request a hearing; and (5) an explanation of the circumstances under which Medicaid benefits will be continued if a hearing is requested.⁸

In *Baker v. State, Dept. of Health & Social Services*, 191 P.3d 1005, 1009 (Alaska 2008), the Alaska Supreme Court held that a Medicaid Personal Care Assistant (PCA) services reduction notice was defective because it failed to provide the recipients with adequate notice: “due process demands that recipients facing a reduction of their public assistance benefits be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department’s action.” *Id.* at 1011. In *Baker*, the Department was required to include the assessment form (PCAT) with its benefit reduction notices. *Id.* at 1012.

In *Allen v. State, Dept. of Health & Social Services*, 203 P.2d 1155, 1168 – 1170 (Alaska 2009), the Alaska Supreme Court held that before the Division could require repayment of allegedly overpaid Food Stamp benefits from a recipient, the Division was required to send the recipient notice containing its detailed calculations and the reasons for the repayment. In its decision the *Allen* court stated (203 P. 3d at 1168):

If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes.⁹

V. Regulations and Policy Manual Provisions Cited in the Division’s Notices.

APA Manual Section 430-2, titled “Resource Limits,” provides in relevant part that, “[t]o 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.”

⁸ One of the cases discussing 42 CFR 431.210 is *Rodriguez By and Through Corella v. Chen*, 985 F.Supp. 1189, 1196 (D. Arizona 1996), *appeal dismissed by Rodriguez v. Chen*, 121 F.3d 716 (9th Cir. 1997). That case involved defective Medicaid benefit denial and termination notices. The court ruled that, because the state agency’s notices failed to contain the information required by the federal Medicaid regulations, the state agency was prohibited from terminating or denying Medicaid benefits without first providing new written notices that complied with the applicable notice requirements.

⁹ One of the cases cited by the Alaska Supreme Court in *Allen* was *Ortiz v. Eichler*, 616 F.Supp. 1046, 1061-1062 (D. Del. 1985), *reargued Ortiz v. Eichler*, 616 F.Supp. 1066 (D. Del. 1985), *affirmed Ortiz v. Eichler*, 794 F.2d 889 (3rd Cir.1986). In *Ortiz* the court stated that, “at a minimum, due process requires the agency to explain, *in terms comprehensible to the claimant*, exactly what the agency proposes to do and why the agency is taking this action” (emphasis added). The court explained that “this detailed information is needed to enable claimants to understand what the agency has decided, so that they may assess the correctness of the agency's decision, make an informed decision as to whether to appeal, and be prepared for the issues to be addressed at the hearing.” *Id.*

Medicaid Aged, Disabled and Long Term Care Eligibility Manual Section 524, titled “Medicaid Exceptions to APA Resource Policy,” states in relevant part that “[t]he value and countability of resources is determined according to the criteria of the APA Program”

7 AAC 100.400, titled “Applicability of APA Regulations,” provides in relevant part as follows:

- (a) The following APA regulations apply to Medicaid eligibility determinations for the eligibility categories described in 7 AAC 100.002(b), (d), and (e) and 7 AAC 100.400 - 7 AAC 100.426 unless otherwise provided in this chapter (1) 7 AAC 40.030 (SSI Program Requirements) . . . (10) 7 AAC 40.230 (Financial Need); (11) 7 AAC 40.240 (Income and Resources of Spouses) . . . (13) 7 AAC 40.260 (Resources); (14) 7 AAC 40.270 (Resource Limits); (15) 7 AAC 40.280 (Resource Exclusions)

7 AAC 100.410, titled “Medicaid Eligibility for SSI and APA Recipients,” provides in relevant part as follows:

- (a) An individual who is eligible for and receiving SSI is eligible for Medicaid under 7 AAC 100.002(b)(1) and this subsection.
- (b) An individual who is eligible for and receiving APA is eligible for Medicaid under 7 AAC 100.002(d)(1) and this subsection.

ANALYSIS

I. Introduction; Definition of Issues; Burden of Proof.

The Division asserts that it was correct to terminate the Claimant’s APA and APA-related Medicaid benefits based on SSA’s termination of the Claimant’s SSI benefits (DPA Hearing Representative’s testimony). The Claimant’s counsel did not dispute this; she acknowledged that “this decision [i.e. the decision in this case as to eligibility for APA and APA-related Medicaid] hinges on their [SSA’s] decision” (argument by Claimant’s counsel at hearing).

However, prior to reaching the merits of the case, it is first necessary to determine whether the Division’s benefit termination notice dated December 9, 2010 (Ex. 3) was legally sufficient to terminate the Claimant’s Adult Public Assistance (APA) benefits and/or the Claimant’s APA-related Medicaid benefits. There are no factual issues to be resolved with regard to the Division’s notice: the notice speaks for itself. Accordingly, the adequacy of the Division’s notice can be resolved as a purely legal matter based on the applicable regulations and judicial decisions.

II. Was The Division’s 2010 Benefit Termination Notice Legally Sufficient?

The Claimant’s position with regard to the adequacy of the Division’s notice dated December 9, 2010 is best summarized in the Claimant’s post-hearing brief dated April 18, 2011 at page 5:

The Notice told the Claimant what the Agency proposed to do but it utterly failed to disclose to the Claimant the detailed factual and legal reasons for the Agency’s proposed action. Nowhere did the Agency tell the Claimant what resources it was

counting. The Notice also failed to disclose the legal standards upon which the termination was based.

The absence of this basic yet fundamental information deprived the Claimant of his right to assess whether the Agency's proposed action 'rested on an incorrect or misleading factual premise or on a misapplication of the Agency's rules or policies to the facts in existence' Because the Agency's Notice failed to meet these standards, the termination of Claimant's APA cash assistance and Medicaid benefits was illegal and should be reversed

The Division's position with regard to the adequacy of the Division's notice dated December 9, 2010 is best summarized in the Division's letter dated April 21, 2011:

[T]he original notice did give [the Claimant] [notice of] adverse action that his APA and Medicaid case was being closed. The notice [contained] the reasons for the proposed adverse action and listed the APA manual section, which APA Medicaid mirrors [The Claimant] was not eligible for Medicaid unless he was first eligible for APA as Medicaid eligibility policy follows APA policy.

The Division's notice dated December 9, 2010 differs somewhat with regard to the Claimant's APA benefits, as opposed to the Claimant's Medicaid benefits (Ex. 3). Accordingly, the adequacy of the Division's notice must be determined separately as to each of the two programs.

A. Was DPA's 2010 Notice Legally Sufficient to Terminate Claimant's APA Benefits?

Alaska "Fair Hearings" regulation 7 AAC 49.070 provides in relevant part that "written notice to the client must *detail the reasons* for the proposed adverse action, *including the statute, regulation, or policy upon which that action is based.*" [Emphasis added]. This regulation is *the starting point* for determining the adequacy of notice under the APA program.¹⁰

The Division's notice dated December 9, 2010 references Adult Public Assistance Manual Section 430-2 as the sole authority for the Division's termination of the Claimant's Adult Public Assistance benefits (Ex. 3). APA Manual Section 430-2, titled "Resource Limits," provides in relevant part that, "[t]o 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."

In order for the above-cited APA Manual Section 430-2 to support the Division's termination of the Claimant's APA benefits, the Division's notice would have to state what resources DPA counted in determining that the Claimant was over-resource, and exactly what values were assigned to each resource. However, the Division's notice merely states: "UNKNOWN is the amount of your countable resources." Accordingly, DPA's notice does not state the facts necessary to support the Division's termination of the Claimant's APA benefits based on APA Manual Section 430-2.

The notice regulation applicable to the Adult Public Assistance Program, 7 AAC 49.070, makes clear that, to be legally sufficient, the facts alleged in a notice as a basis for benefit termination must be

¹⁰ As discussed below, the Alaska Supreme Court's decisions in the *Baker* and *Allen* cases, (summarized in the Principles of Law, above), indicate that due process may require *more* information, in a particular case, than what is explicitly stated in a regulation.

supported by the appropriate regulation or policy manual section. In addition, pursuant to the Alaska Supreme Court's decisions in *Baker v. State* and *Allen v. State*, (discussed in the Principles of Law at pages 6-7, above), when a regulation or policy manual section is cited as a basis for termination, *the facts which make that regulation or policy manual section applicable must also be set forth in the notice.*¹¹ In this case, the resources and valuations necessary to support a benefit termination based on APA Manual Section 430-2 are conspicuously absent from the Division's notice.

The Division's Fair Hearing Position Statement and its Hearing Representative's presentation at hearing indicate that the Division *intended* to terminate the Claimant's Adult Public Assistance benefits *based not on its own resource eligibility determination*, but rather *on the Social Security Administration's termination of the Claimant's Supplemental Security Income (SSI) benefits.*¹² The facts set forth in the Division's notice (Ex. 3) can be read as supporting such a basis for termination. However, the Division's notice *does not contain* a citation to the regulation supporting automatic termination of the Claimant's Adult Public Assistance benefits based solely on the Social Security Administration's prior termination of the Claimant's Supplemental Security Income benefits.¹³

In summary, the Division's notice recited *facts* which would support a termination of benefits pursuant to 7 AAC 40.060(c), but the notice failed to cite that *regulation*. The Division's notice cited APA Manual Section 430-2, but failed to state the resource values (i.e. the supporting facts) on which a benefit termination pursuant to APA Manual Section 430-2 must necessarily be based.¹⁴ Accordingly, the Division's notice did not comply with the requirements of 7 AAC 49.070, *Baker v. State*, and *Allen v. State*, (discussed in the Principles of Law at pages 6-7, above). The Division's notice dated December 9, 2010 was therefore not legally sufficient to terminate the Claimant's Adult Public Assistance benefits.

¹¹ The Alaska Supreme Court stated in *Allen* that due process requires that recipients be given notice which details the reasons for a benefit termination, and that "such notices should provide sufficient information to allow recipients to detect and challenge mistakes." *Allen*, 203 P.2d 1155 at 1168. "Without this information, claimants cannot check the factual much less the mathematical accuracy of [the Department's] intended action." *Ford v. Shalala*, 87 F.Supp.2d. 163, 178 (E.D.N.Y.1999), quoted by the Alaska Supreme Court in *Allen*, 203 P.2d 1155 at 1168.

¹² The Alaska Supreme Court's decision in *Allen* makes it clear, however, that a benefit denial or reduction notice must stand on its own; the Division may not rely on supplemental notices or the hearing process to supply information which should have been provided in the first instance. See *Allen*, 203 P.2d 1155 at 1168.

¹³ The regulation which would support an "automatic" termination of APA benefits, based on a prior SSA resource determination, is 7 AAC 40.060(c). That regulation provides in relevant part that, "[i]f an applicant is receiving SSI benefits and is determined by the Social Security Administration to be ineligible, except as provided in (d) and (e) of this section, [which do not apply on the facts of this case], the division will terminate assistance in accordance with 7 AAC 49.060, regardless of whether the applicant files an appeal with the Social Security Administration." Again, however, neither of the Division's two notices contains a citation to this regulation.

¹⁴ Stated differently, it is not sufficient for a notice to state one set of facts which may justify termination of benefits, and then cite a regulation which may justify benefit termination *based on a different set of facts*. The facts set forth in the notice must pertain to the regulation cited, and vice-versa. This "is necessary to protect claimants against proposed agency action 'resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.'" See *Ortiz v. Eichler*, 794 F.2d 889, 893 (3d Cir.1986), quoted by the Alaska Supreme Court in *Allen*, 203 P.2d 1155 at 1168.

B. Was DPA's 2010 Notice Legally Sufficient to Terminate Claimant's Medicaid?

Alaska "Fair Hearings" regulation 7 AAC 49.070 specifically requires that "written notice to the client . . . detail the reasons for the proposed adverse action, *including the statute, regulation, or policy upon which that action is based.*" [Emphasis added]. Similarly, federal Medicaid regulation 42 CFR 431.210(a) specifically requires that notices issued in the administration of the federal Medicaid program which involve the suspension, reduction, or termination of benefits provide both "the reasons for the action" and "the specific regulation that supports the action." The Alaska Supreme Court has clearly adopted these as due process requirements (*see Baker v. State, Dept. of Health & Social Services*, 191 P.3d 1005, 1009 (Alaska 2008) and *Allen v. State, Dept. of Health & Social Services*, 203 P.2d 1155, 1168 – 1170 (Alaska 2009)). These requirements have also been emphasized repeatedly by the federal courts (*see Ortiz v. Eichler*, 616 F.Supp. 1046, 1061-1062 (D. Del. 1985) and *Rodriguez By and Through Corella v. Chen*, 985 F.Supp. 1189, 1196 (D. Arizona 1996)).

The Division's rationale for termination of the Claimant's Medicaid benefits, as stated in the notice dated December 9, 2010, is that "[i]f Social Security has determined that you are not resource eligible for SSI then you can no longer be resource eligible for . . . APA-related Medicaid" (Ex. 3). However, as noted in the preceding section, the only authority for the Division's termination of the Claimant's Medicaid benefits which was stated in the Division's notice is APA Manual Section 430-2 (Ex. 3). APA Manual Section 430-2 provides in relevant part that "[t]o 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."

There are two problems with the notice's reliance on APA Manual Section 430-2 for termination of the Claimant's Medicaid benefits. First, the policy is, on its face, applicable to the APA program, not the Medicaid program. Second, as discussed in the preceding section, the Division's notice does not contain the predicate facts necessary to sustain a termination of benefits based on the criteria of the Manual Section (i.e. the notice does not state what resources were counted in the eligibility determination, or the values DPA assigned to those resources).

Accordingly, the Division's notice dated December 9, 2010 (Ex. 3) does not satisfy the minimum notice requirements specified by the regulations and judicial decisions discussed above. The Division's notice dated December 9, 2010 was therefore not legally sufficient to terminate the Claimant's APA-related Medicaid benefits.

III. Was the Division's Revised Notice Dated April 12, 2011 Legally Sufficient?

On April 12, 2011, five days after the hearing held in this case, the Division mailed a revised termination notice to the Claimant (Ex. 11). That notice added references to Medicaid Aged, Disabled, and Long Term Care Manual Section 524, 7 AAC 100.400, and 7 AAC 100.410, as supporting termination of the Claimant's Medicaid benefits. However, as discussed in footnote 10 at page 8, above, these regulations do not support termination of the Claimant's Medicaid benefits based on the facts stated in the notice. The regulation supporting an "automatic" termination of APA benefits, based on a prior SSA resource determination, is 7 AAC 40.060(c). However, neither of the Division's two notices contains a citation to this regulation. Accordingly, for the reasons stated in Section II, above, the Division's revised notice dated April 12, 2011 was not legally sufficient to terminate the Claimant's Adult Public Assistance or APA-related Medicaid benefits.

IV. What is the Effect of the Division's Legally Insufficient Notice?

The Claimant's legal representative clearly became aware of the Division's asserted basis for termination of the Claimant's benefits during the course of the hearing and/or briefing in this case. Under prior law, this might have cured the defective notice provided by the Division. However, under the 2009 *Allen* decision, defective notice cannot be cured by simply having a claimant go through the hearing process and thereby obtain the information that the initial notice should have contained. *See Allen*, footnote 68 at 1169. Accordingly, in this case the deficiencies with the Division's notices dated December 9, 2010 and April 12, 2011 were not cured by the Claimant's participation in the hearing process.

In *Allen*, the Alaska Supreme Court did not automatically find in favor of the claimant because of the defective notice. Instead, the court allowed the Division to correct its defective notice by completely reissuing it (*Allen* at 1169). Accordingly, in this case the Division must likewise be given the option of issuing a legally sufficient benefit termination notice to the Claimant.

If the Division, following receipt of this order, again issues a benefit termination notice, and if, after receipt of the new notice, the Claimant still disagrees with the Division's action, the Claimant may then request a new hearing within 30 days of the Division's action (7 AAC 49.040). In that event, the Claimant would be entitled to a new hearing.

CONCLUSIONS OF LAW

1. The Division's benefit termination notices dated December 9, 2010 and April 12, 2011 did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070, or applicable Alaska Supreme Court decisions, with regard to their purported termination of the Claimant's Adult Public Assistance benefits.
2. The Division's benefit termination notices dated December 9, 2010 and April 12, 2011 did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070, federal Medicaid regulation 42 CFR 431.210(a), or applicable Alaska Supreme Court decisions, with regard to their purported termination of the Claimant's APA-related Medicaid benefits.
3. The notice deficiencies with regard to the Division's benefit termination notices dated December 9, 2010 and April 12, 2011 have not yet been cured.
4. Accordingly, the Division was not correct when, on December 9, 2010, it notified the Claimant that it would terminate his Adult Public Assistance and APA-related Medicaid benefits after December 31, 2010.

DECISION

The Division was not correct when, on December 9, 2010, it notified the Claimant that it would terminate his Adult Public Assistance and APA-related Medicaid benefits after December 31, 2010.

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. 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. To appeal, 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

DATED this 20th day of June, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on June 20, 2011 true and correct copies of this document were sent to the Claimant via USPS Mail, and to the remainder of the service list by secure / encrypted e-mail, as follows:

Claimant, C/O [REDACTED], Esq.
Alaska Legal Services Corporation
(via Certified Mail, Return Receipt Requested)

[REDACTED], DPA Hearing Representative
[REDACTED], DPA Hearing Representative

[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Administrative Assistant II
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(signed)

By: _____
J. Albert Levitre, Jr.
Law Office Assistant I