

Office of Hearings and Appeals  
3601 C Street, Suite 1322  
P. O. Box 240249  
Anchorage, AK 99524-0249  
Telephone: (907)-334-2239  
Fax: (907)-334-2285

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

In the Matter of )

██████████, )

Claimant. )

OHA Case No. 11-FH-2309

DPA Case No. ██████████

Division Case No. ██████████

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

Mr. ██████████ (hereinafter “Claimant”) was receiving benefits under the TEFRA<sup>1</sup> category of the Alaska Medicaid program. Claimant’s eligibility for continued benefits was reviewed to determine if he still needed the level of care provided by an intermediate care facility for mentally retarded (ICF/MR) persons. (Reviewer’s testimony) The Division of Public Assistance<sup>2</sup> notified Claimant<sup>3</sup> by letter dated July 19, 2011 that his TEFRA benefits would be terminated. (Ex. D) On August 9, 2011, Claimant requested a fair hearing. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010 - .020 and 42 C.F.R. Subpart E.

The fair hearing began on October 24, 2011 and continued again on November 3, 2011. Claimant appeared solely through his mother, Mrs. ██████████, who appeared in person. Claimant was represented by Mr. Mark Regan, Esq. of the Disability Law Center of Alaska. The Division of Senior and Disabilities Services (Division) was represented by Ms. Kimberly Allen, Esq. Assistant Attorney General, State of Alaska. Ms. ██████████, Health Program Manager with the Division of Senior and Disabilities Services, (Reviewer) who is the “qualified mental retardation professional who reviews level of care eligibility.” (Reviewer) participated in person, and testified on behalf of the Division. At the

<sup>1</sup> This category of Medicaid benefits is authorized by an Equity and Fiscal Responsibility Act (TEFRA) of 1982 (PL 97-248) at Section 134. See 42 USC 1396a. The category of benefits is commonly called TEFRA benefits.

<sup>2</sup> The Division of Public Assistance determines eligibility for benefits and has contracted with a company called Qualis Health (Qualis) to perform the level of care determinations applicable to Medicaid eligibility, among other work. Qualis, in turn, has contractually delegated its obligations to the Division of Senior and Disabilities Services (DSDS). A Division of Senior and Disabilities Services staff member reviews applications to see if the level of care requirements are met. (Ex. B, pp. 30-32; Division’s Closing Statement and Reply, at 4; ██████████ testimony). After a determination is made, the information is returned through this process and a notice is issued by the Division of Public Assistance. See Principles of Law section. Qualis Health serves throughout the United States and has a website at [www.qualishealth.org](http://www.qualishealth.org).

<sup>3</sup> Claimant, himself, did not personally participate in the fair hearing. All attributions to “Claimant” are understood to mean his parents and/or caregivers.

November 3, 2011 hearing, the same persons participated in their same respective capacities. Additionally, at the November 3, 2011 hearing, Ms. [REDACTED], Social Services Program Coordinator with the Division of Public Assistance, participated telephonically and testified on behalf of the Division.

Following the close of the evidentiary record at the end of the hearing on November 3, 2011, the parties submitted post-hearing briefing.<sup>4</sup>

### ISSUE

On July 19, 2011, was the Division correct to terminate Claimant's receipt of Medicaid TEFRA benefits because he "no longer meets the level of care criteria" for eligibility?

### FINDINGS OF FACT

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

1. Claimant, born [REDACTED], 1997, was between 13 and 14 years old at the time of this case. (Ex. E, p. 3) Claimant was receiving Medicaid benefits through the "disabled child living at home," a/k/a TEFRA program. (Reviewer's testimony; Ex. D, p. 1) On July 5, 2011, Claimant listed his primary diagnosis on an Inventory for Client and Agency Planning (ICAP) demographic form as "Other MR like Condition" (Ex. E, p. 3)
2. The Division of Senior and Disabilities Services terminated Claimant's TEFRA benefits on July 19, 2011 because: (Ex. D, p. 1)
  - a. It "determined that [Claimant] no longer meets level of care requirements pursuant to State regulations 7 AAC 100.002(d)(5) and 7 AAC 100.424" and
  - b. To meet the level of care requirements, Claimant "must have a qualifying diagnosis, which includes: Mental Retardation, Cerebral Palsy, Autism (299.00), Seizure Disorder, or other Mental Retardation Related Condition" which the Division determined he does not have, and
  - c. Claimant's diagnosis of "Attention Deficit Hyperactivity Disorder Combined Type" is not "a diagnosed condition closely related to Mental Retardation."
3. The denial notice stated, in pertinent part:

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<sup>4</sup> During the hearing, the Division's witnesses were unable to factually answer Claimant's question regarding the basis on which he had been deemed eligible for TEFRA in the past. Ms. [REDACTED] testified that she did not have access to Claimant's file and that the decisions were made at Qualis Health, then transmitted to her in the form of an email. Claimant's Initial Post-Hearing Memorandum, at page 2, referred to the 2004 fair hearing decision (03-FH-480), which found him eligible for TEFRA benefits. The Division requested a copy of the decision, which was provided. In the Division's Closing Statement and Reply, at pages 2 and 14, the Division objected to this additional information.

In support of its Closing Statement, the Division appended additional information in the form of excerpts of printed information, attributed as copied from the American Psychiatric Association's manual for diagnosis and treatment. The appendix was labeled as Exhibit 1 to its Closing Statement and Reply. The Hearing Authority did not consider, nor rely on, either of the supplementary materials in reaching the decision in this case.

Documentation submitted indicates that [Claimant] does not have any of the qualifying diagnoses listed above and does not have a diagnosed condition closely related to Mental Retardation. Therefore, [Claimant] does not meet the criteria for a qualifying diagnosis for the ICF/MR level of care. (Ex. D, p. 1)

### Intelligence Quotient Facts

4. The Division's Reviewer made her determination after reviewing only the information supplied in Exhibit E.<sup>5</sup> (Reviewer's testimony) Exhibit E consists mostly of an "Evaluation summary and Eligibility Report" (Summary) prepared for a meeting involving the Anchorage School District on December 13, 2010. (Ex. E, pp. 31-72) The Summary relates to the Anchorage School District Individual Education Plan (IEP) for Claimant for the year March 16, 2011 through March 16, 2012. (Ex. E, pp. 73-107)

5. The Summary references an evaluation date of November 29, 2010. (Ex. E, p. 32) On or about November 29, 2010, Claimant was administered the Kaufman Brief Intelligence Test-2 (K-BIT2) (Kaufman) by Anchorage School District School Psychologist [REDACTED]. (Ex. E, pp. 32-33) Claimant was scored with "IQ Composite" of 80. (Ex. E, p. 33) The Division's Reviewer relied principally on this IQ score of 80 to determine Claimant did not have a qualifying diagnosis of mental retardation. (Reviewer's testimony)

a. The derivation of the composite score of 80 on the Kaufman is not explained by the other information in the assessment report. The information reported is precisely as follows, in relevant part:(Ex. E, p. 33)

The K-BIT2 is a brief, individually administered measure of verbal and nonverbal intelligence. Standard scores between 85-115 are considered to be within the average range. The %ile rank indicates the percentage of children of the same age who score the same as or lower than this child.

	<u>Standard Score</u>	<u>Range</u>	<u>Percentile Rank</u>
Verbal	84	Low Average	14th
Non-verbal	81	Low Average	10th
<b>IQ Composite</b>	<b>80 (74-88)*</b>	<b>Low Average</b>	<b>9th</b>
<b>*(90% Confidence Interval )</b>			

Dylan received an IQ composite score of 80, a score noted in the low average range (9th %ile). No significant difference was noted between Dylan's verbal and nonverbal score on the KBIT-II.

Averaging verbal and non-verbal scores does not result in a composite score of 80. The composite percentile rank does not compute either. (Ex. E, p. 33)

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<sup>5</sup> Exhibit E includes about four pages of consent and demographic information forms relating to the ICAP, and one page showing results of a glucose tolerance test. (Ex. E, pp. 1-5) The demographic form shows "Primary Diagnosis: Other MR Like Condition." (Ex. 3, p. 3). Other documents in Exhibit E appear to have been the sources of excerpts included in the Summary. The Summary includes substantial information concerning Claimant's educational assessments. (See, e.g., Ex. E, pp. 56-72)

b. The Kaufman assessment report states, in relevant part, under “IQ Testing Observation:

Rapport was established and [Claimant] put forth a good effort during the ability assessment. [Claimant] was engaged and focused on the testing material .... Once a testing ceiling was reached, [Claimant] was given the option to try an additional question, or to stop. On all three subtests, [Claimant] expressed interest in trying at least one more question. [C]laimant even tried 4 additional questions on the matrices subtest beyond the ceiling, even though the questions were perceived as difficult.” (Ex. E, p. 33)

c. The Kaufman report further states: “it is important to note that this ability assessment requires minimal verbal responses, and no writing required by the student.” (Ex. E, p. 33)

6. Claimant’s historical record of IQ assessments all resulted in scores below 70. (Ex. E, p. 34) In June/July 2010 an IQ assessment was reported as “invalid” because he was unable to meet the needs of the test(s). (Ex. E, p. 34)

a. In March 2003, Claimant was evaluated using the Stanford Binet IV (SB-FE) test and scored IQ of  $68 \pm 5$ .

b. In April 2003, Claimant was evaluated using the Wechsler Preschool and Primary Scale of Intelligence – III (WPPSI-III) test and scored IQ of 54.

c. In March 2006, Claimant was evaluated using the Wechsler Intelligence Scale for Children – IV (WISC-IV) and scored IQ of 54. (Ex. E, p. 34)

d. In June/July 2010, Claimant was administered the Wechsler Intelligence Scale for Children (WISC-IV) assessment by [REDACTED], Licensed Psychologist, who reported he could not get a valid result “due to poor effort, low frustration tolerance, and [Claimant’s] struggles with sustained attention.”<sup>6</sup> (Ex. E, p. 34)

#### Facts Concerning Claimant- non-IQ

7. On June 30, 2010, July 8, 2010 and July 9, 2010, the Dr. [REDACTED], Licensed Psychologist at [REDACTED] of Minnesota evaluated Claimant to provide his parents with “additional information about his academic, behavioral and emotional functioning.” (Ex. E, pp. 19-30) The evaluation report states Claimant previously was diagnosed with “ADHD: Inattentive Type,” “Speech Apraxia,” “dysgraphia, and “sensory integration issues” (Ex. E, pp. 19, 27) This report has several notations that Claimant is uncooperative during evaluative testing. (Ex. E, pp. 21-24, 27) He is described as making “poor effort,” having “low frustration tolerance,” “struggles with sustaining his attention,” “refusing to continue,” “not wanting to do any more questions,” and “initially quite cooperative.” (Ex. E, p. 22)

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<sup>6</sup> This excerpt was taken from a larger assessment conducted by the [REDACTED] on June 30, 2010, July 8, 2010, and July 9, 2010. (Ex. E, pp. 19-30)

A psychiatric consultation and evaluation was recommended. (Ex. E, p. 28)

8. The Summary includes Claimant’s assessment by the Anchorage School District on November 11, 2010 using the Behavior Assessment System for Children, Second Edition (BASC-2). (Ex. E, p. 36) The results of this assessment are stated as “[n]o clinically significant scores were noted.” (Ex. E, p. 36) A “personal adjustment composite” score of 60 is noted, although the only score higher than 60 on any test category is a 68 in “somatization.” (Ex. E, p. 36-37).

9. A few days later, on December 7, 2010, the Behavior Assessment System for Children, Second Edition (BASC-2) was again administered. (Ex. E, p. 39) On this test, Claimant’s “adaptive skills composite” was 38. (Ex. E, p. 40)

The assessment was conducted by the teacher who taught Claimant during the spring semester at the ██████████ (Anchorage) and who described “[c]linically significant scores: Attention Problems, learning Problems, School Problems, and Atypicality.” (Ex. E, p. 39) Previously, on May 7, 2010, the ██████████ Center (██████████) wrote Claimant’s parents about the progress Claimant made during the prior school year. ██████████ is “a school for students with language processing difficulties” and is for students with dyslexia. (Ex. E, p. 9) Claimant, then 13 years old, was reported as having math skills of a 3.8 grade level. (Ex. E, p. 9) Claimant’s reading fluency was reported as improved to “94 wpm” with a “16% increase in recall” due “in part, to the persistence of his teachers in working to keep him focused and on task.” (Ex. E, p. 9)

10. Claimant’s adaptive behavior measures as measured by the Vineland Classroom Edition of test are included in the Summary as (Ex. E, pp. 41-42):

Date of Eval.	1/22/2003	3/19/2003	3/06/2006	3/06/2006	12/7/10
Communication	84	66	70	n/a	72
Daily Living	65	65	42	n/a	65
Social	69	72	76	n/a	79
Motor	64	68	n/a	n/a	n/a
Composite	68	61	58	66	69 ± 4
Percentile	2nd	5th	n/a	n/a	n/a

Test Results Characterizing Claimant

11. On September 1, 2010, Claimant, then about 13 ½ years old, was evaluated at the Childhood Communication Center as part of an inpatient psychiatric program at Children’s Hospital and Regional Medical Center in Seattle, WA, where he was a patient. (Ex. E, pp. 6-8) Although the evidentiary record contains only the speech and language evaluation, Claimant’s “diagnoses under consideration included Depressive Disorder (NOS), Pervasive Development Disorder (NOS), Dyslexia by history, ADHD by history, Enuresis/Encopresis by history, Trichotillomania by history and rule out Anxiety Disorder (NOS).” (Ex. E, p. 6) The speech and language evaluation report memorializes “reluctance and resistance” to the testing, rapid frustration with the task(s) requested of him, and shutting down, refusing to participate. (Ex. E, p. 7)

12. Between October 12 through November 30, 2010, Claimant completed 44.25 hours of instruction in reading comprehension and math through the Tutoring and Individual Learning Services business. (Ex. E, p. 11) The report of that effort includes “[Claimant] does struggle with trying to stay focused on what we are doing. It is very difficult at times to keep him engaged....” (Ex. E, p. 12)

13. The Woodcock-Johnson III Tests of Achievement administered by Anchorage School District Psychologist [REDACTED] on November 11, 2010 evaluated Claimant as having a “Broad Mathematics Grade Equivalent of 2.3” and a “Broad Written Language Grade Equivalent of 2.8.” (Ex. E, p. 44) Claimant was “at or below the 1st” percentile when compared to age related peers. (Ex. E, p. 44)

14. The Tutoring and Individual Learning Services business December 16, 2010 report states, in part: “[Claimant] has shown difficulty with compliance to specific requests that he does not want to do. ...He struggles to communicate his ideas verbally and in written expression....” (Ex. E, p. 15) Later, “[d]ue to [Claimant’s] short-term memory weakness, it is critical that he is monitored to ascertain what information he has acquired and what information needs to be repeated and connected to previously learned information to allow a pathway to be built between long-term memory and newly acquired information.” (Ex. E, p. 16)

#### The Division’s Reviewer

15. The Division’s Reviewer’s testimony established the following:

a. She is an employee of the Division of Senior and Disabilities Services who serves as the Division’s “qualified mental retardation professional.” She does this because the Division is under contract with Qualis Health (Qualis) to review applications and eligibility determinations pertaining to intermediate care facility/mentally retarded level of care. She is not a nurse or doctor.

b. She wrote the paragraph which is quoted in the middle of page 1 of the denial letter. She sent it, as her determination, to Qualis. The paragraph in the denial letter sent by the Division of Public Assistance to Claimant on July 19, 2011 is unchanged from the wording that she sent to Qualis.

c. She reviewed Claimant’s diagnosis as part of a routine review of his eligibility. Claimant previously was found eligible for the ICF/MR level of care under a mental retardation diagnosis. She does not know of any other basis for his eligibility because only the primary qualifying diagnosis is reviewed. She is unaware of a developmental delay diagnosis or any information outside the packet of materials supplied as Exhibit E.

d. Claimant was denied continuation of TEFRA benefits because the medical documentation he supplied did not provide a diagnosis which met the qualifications for eligibility. Because he was denied at this level of the review, the Inventory for Client and Agency Planning (ICAP) assessment was not performed.

e. She ruled out a diagnosis of mental retardation based on Claimant’s score on a test administered by [REDACTED], Anchorage school district school psychologist on November 29, 2010. (See Ex. E, pp. 31-33) On that test, Claimant’s composite IQ score was 80.

(See Ex. E, p. 33) A score of 80 is not within 2 standard deviations of the score of 70. A score of 70, plus up to five points, is a score which is allowed for a qualifying diagnosis of mental retardation. Therefore Claimant did not meet the requirement for a diagnosis of mental retardation.

f. An IQ of 80 is in the low average range (See also, Ex. E, p. 33). A person is diagnosed as mentally retarded if the person has an IQ of 70 or lower, according to the Diagnostic and Statistical Manual of Mental Disorders (DSM). Claimant's score placed him out of the mental retardation range for purposes of having a diagnosis qualifying him for ICF/MR level of care.

g. As a reviewer she looks at adaptive functioning as well as intellectual functioning as disclosed on the Inventory for Client and Agency Planning (ICAP) when evaluating if a child has a condition closely related to mental retardation. The ICAP was not administered because Claimant was denied for lack of a qualifying diagnosis so she did not look at any ICAP results. She reviewed the non-IQ related information in the file and believes it shows Claimant is delayed academically.

h. Claimant's prior diagnosis of mental retardation was based on prior IQ scores that were below 70.

i. When reviewing Medicaid eligibility, she relies on Claimant's current IQ assessment and not prior assessments.

j. She did not question the high IQ score of 80 because that "is not [her] function" and there was nothing in the report that indicated the results of the test were invalid.

k. When she considered Claimant's adaptive functioning in terms of whether he had a condition closely related to mental retardation, she believed his circumstances showed he had academic delays but was not mentally retarded.

## **PRINCIPLES OF LAW**

### **I. Burden of Proof and Standard of Proof**

A party who is seeking a change in the status quo has the burden of proof by a preponderance of the evidence. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). "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." *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

### **II. Medicaid**

The State of Alaska provides medical assistance to needy persons who are eligible. AS 47.07.010; AS 47.07.020. It does this, in part, by participating in the national medical assistance program provided by

42 U.S.C. 1396 – 1396p, (Title XIX of the Social Security Act), which provides grants to states for medical assistance programs, including Medicaid. Participating states are required to provide some Medicaid benefits and may opt to provide additional Medicaid benefits (optional programs).

A state has the option of providing Medicaid benefits for children under the age of 19 who would be eligible for Medicaid if they were in a medical institution. These kind of benefits are addressed, in part, at 42 C.F.R. § 435.225. A state providing benefits under section 435.225 is required to ensure the child meets certain conditions of eligibility. 42 C.F.R. § 435.225(b). Included among the eligibility criteria is that the child requires the level of care provided in a hospital, skilled nursing facility or intermediate care facility. 42 C.F.R. § 435.225(b)(1).

Eligibility for Medicaid benefits must be re-determined periodically. 42 C.F.R. § 435.916. The Division must “continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible.” 42 C.F.R. § 435.930.

Alaska provides Medicaid benefits to persons who are eligible under the Medicaid categories made available by 7 AAC 100.002. TEFRA benefits are made available as a specific optional category provided by 7 AAC 100.002(d).

### III. Disabled Child Living at Home (7 AAC 100.424) : The Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982 (PL 97-248) Optional Medicaid Benefit in Alaska

Alaska provides benefits to children under several program as a result of its election to provide optional categories of Medicaid coverage. *See, e.g.,* Alaska Statute (AS) 47.07.020(b)(11), (12), (13).

A child with a disability, under the age of 19 years, who does not qualify for federal Supplemental Security Income (SSI) benefits “because of parental income or resources” but has been determined to be disabled according to SSI criteria, may be eligible for a special category of Medicaid benefits under a program commonly called TEFRA. 7 AAC 100.002(d)(5); 7 AAC 100.424(a).

#### A. Regulation 7 AAC 100.002(d)(5)

Alaska regulation 7 AAC 100.002(d)(5) provides for this (TEFRA) optional category of Medicaid, in relevant part, for:

...children with a disability living at home who meet the requirements of 42 U.S.C. 1396a(e)(3) and who are eligible under 7 AAC 100.424;....

#### B. Regulation 7 AAC 100.424

Alaska regulation 7 AAC 100.424(a) establishes the eligibility criteria for TEFRA benefits:

First, the child must be under 19 years of age; and (2) the Department of Labor and Workforce Development has determined that the child is disabled according to SSI criteria. 7 AAC 100.424(a)(1) and (2).

Second, the child must be eligible for Medicaid (under 7 AAC 100.002(d)(4)) if the child were living in a medical institution. 7 AAC 100.424(a)(3).

Third, the child is living in the child's parent's home or that of the child's legal guardian. 7 AAC 100.424(a)(4).

Fourth, the department has determined that the child needs a level of care offered in an acute care hospital, long-term care as determined under 7 AAC 140.505, or the level of care offered by an intermediate care facility for the mentally retarded as determined under 7 AAC 140.600 or the level of care provided at an inpatient psychiatric hospital. 7 AAC 100.424(a)(5)(A), (B), and (C).

Fifth, the department determines that the child may receive necessary medical care in a setting other than a medical institution described in 7 AAC 100.424(a)(5)(A), (B), and (C) and the determination is recorded in the child's plan of care approved by the department. 7 AAC 100.424(a)(6).

Sixth, the department has determined that the estimated cost of services provided to the child outside the home will cost less than the cost of institutionalization. 7 AAC 100.424(a)(7).

### C. Regulation 7 AAC 140.600

This case involves a child whose level of care determination pertains to the level of care provided by an intermediate care facility for the mentally retarded, which is abbreviated as ICF/MR and addressed in 7 AAC 140.600. Regulation 7 AAC 140.600 provides that in determining whether a recipient qualifies for a level of care provided by an intermediate care facility for the mentally retarded (ICF/MR),<sup>7</sup> a "qualified mental retardation professional within the department" must determine the recipient "meets the functional criteria" of subsection (d) and must have one of five "conditions" identified in 7 AAC 140.600(c). Of those five conditions, only two may be relevant to the circumstances of this case.<sup>8</sup>

Regulation 7 AAC 140.600(c), describes the ICF/MR level of care criteria, in relevant part as:

(1) mental retardation that meets the diagnostic criteria for code 317, or 318.0, 318.1, or 318.2, as set out in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, adopted by reference in 7 AAC 160.900; the recipient must have an intelligence quotient of 70 points or less as determined by an individual, standardized psychological evaluation, plus up to five points to account for any measurement error;

(2) a condition that is

(A) one other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance; and

(B) found to be closely related to mental retardation because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with mental retardation; the condition must be diagnosed by a licensed physician and require treatment or services similar to those required for individuals with mental retardation;....

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<sup>7</sup> The acronym "'ICF/MR' means an intermediate care facility for the mentally retarded." 7 AAC 160.990(31).

<sup>8</sup> The conditions of cerebral palsy, seizure disorder, and autism were not described in the evidence and are not at issue here.

Additional requirements to meet the ICF/MR level of care are found at regulation 7 AAC 140.600(d), that provides, in relevant part:

- (d) Each condition identified in (c) of this section must
  - (1) have originated before the age of 22 years;
  - (2) be likely to continue indefinitely; and
  - (3) constitute a substantial disability to the individual's ability to function in society, as
    - (A) measured by the *Inventory for Client and Agency Planning (ICAP)*, adopted by reference in 7 AAC 160.900; and
    - (B) evidenced by a broad independence domain score equal to or less than the cutoff scores in the department's *Table of ICAP Scores by Age*, adopted by reference in 7 AAC 160.900.

#### IV. DPA Policies: Aged, Disabled and Long Term Care Medicaid Eligibility Manual (Manual) at § 533

The Department of Health and Social Services includes within its jurisdiction the Division of Public Assistance (DPA) and the Division of Senior and Disabilities Services (DSDS). Both Divisions are involved in determining eligibility for continued TEFRA benefits.<sup>9</sup> The Division of Public Assistance (DPA) is charged with responsibility to make the eligibility determinations for TEFRA applicants. The Division of Public Assistance has contracted with Qualis Health, a national, private organization, to perform some of its eligibility responsibilities. Qualis Health has delegated some of these responsibilities to DSDS. The regulations and policies important to this case are discussed below.

The Division of Public Assistance (DPA) policies and procedures concerning TEFRA eligibility and application processing are found in the policy manual at: <http://dpaweb.hss.state.ak.us/manuals/adltc/adltc.htm>. The case file contains the portions of this manual relevant to TEFRA at Exhibit B, pp. 27-37.

The DPA calls TEFRA applicants "disabled children at home." Aged, Disabled and Long Term Care Medicaid Eligibility Manual (Manual) at § 533; *See also*, 7 AAC 100.424. DPA delegates some of its responsibilities to other entities. DPA delegated to Qualis Health the responsibility to ensure an applicant, or recipient under review, meets criteria 5-7 of Manual § 533 A. Criteria 5-6, relevant to this case, are:

- 5. The child meets one of the following level of care (LOC...) standards:
  - Acute care hospital, nursing facility, or intermediate care facility...;
  - Intermediate care facility for the mentally retarded ( ICF/MR Intermediate Care Facility for the Mentally Retarded ...); and
  - Inpatient psychiatric hospital ....

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<sup>9</sup> In addition, the Department of Labor and Workforce Development may become involved.

The department contracts with Qualis Health to determine or facilitate the determination of the appropriate level of care.

In addition, Manual § 533 A provides DPA has the responsibility to:

[M]ake sure that Qualis Health has approved the applicant and the *DDS*<sup>10</sup> has determined disability before the child is authorized for Medicaid under this eligibility category.

Importantly, Manual § 533 A concludes with the statement: “Children in this category are eligible for all regular Medicaid services, but they do not receive home and community-based ( *HCB* ) waiver services.”

#### A. Manual § 533 C. Referral and Interagency Communications

DPA Manual § 533 C. describes the responsibilities of Qualis Health as including “[c]ompleting an initial screening process to determine whether the child appears to meet one of the three LOC standards...” and “[w]orking closely with care coordinators regarding the medical eligibility decision and required paperwork.” Qualis also is charged with “[e]mailing the DPA caseworker when LOC is approved or denied with the name and phone number of the care coordinator.”

DPA Manual § 533 C. describes the responsibilities of the Division of Senior and Disabilities Services (DSDS) as including “[c]ompleting the ICAP assessment and making ICF/MR-LOC determinations,” “processing all referrals for initial ICF/MR-LOC determination and renewals received from Qualis Health,” and “reporting ICF/MR-LOC approvals or denials to Qualis Health; ...”

#### B. Manual § 533 E. TEFRA Reviews

DPA Manual § 533 E. describes the review process for TEFRA recipients. Initially, DPA’s responsibilities include checking current disability and level of care (LOC) status and current financial eligibility. If DPA finds the standards are met, then it approves the case.

DPA expressly is responsible to “[c]heck for current LOC status...” Manual § 533 E. 1. If the DPA finds the level of care is “not current”, DPA then must contact “Qualis Health for current status.” DPA must act to close the case if the LOC review has been denied or not reviewed after an opportunity has been given to the child’s parents to have a review. Manual § 533 E. 1.

DPA Manual § 533 E. 3. Describes the level of care (LOC) renewal process. It specifies “Qualis Health has the primary responsibility for tracking all LOC renewal dates...”<sup>11</sup> For ICF/MR level of care cases, “Qualis Health will make a referral to DSDS for an ICAP evaluation.” ... “When the ICAP is completed, DSDS will forward the results to Qualis Health. If the child passes ICAP scoring, Qualis Health will approve LOC and notify DPA.” If the child fails ICAP scoring, actions leading to case closure are taken. *See Ex. B, p. 38.*

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<sup>10</sup> DDS is described by web link as “Disability Determination Service.” The Division’s DPA witness, Rich, testified the Disability Determination Service operates under the Division of Labor and Workforce Development.

<sup>11</sup> Qualis is to maintain a database of open TEFRA Medicaid cases and the database “will include the LOC, ... and other identifying information. (Ex. B, p. 37)

### C. DSDS Policies do not address TEFRA renewals

The Division of Senior and Disabilities Services (DSDS) Policy and Procedure Manual, effective February 1, 2011, provides “a standardized process for program eligibility determinations.” There is no specific section in the DSDS manual pertaining to TEFRA. The Manual identifies the Division’s “[r]equired diagnostic documentation” for eligibility determinations for intellectually and developmentally disabled persons (IDD) who are seeking benefits under the Home and Community-Based Services Waiver (HCBS Waiver) program. The HCBS Waiver program is a Medicaid funded program, distinct and separate from the TEFRA program. The text of the policies and procedures applicable to the IDD Waiver program are not identified as applicable to eligibility criteria for TEFRA applicants. <http://www.hss.state.ak.us/dsds/policies/PDFS/IDDElig13111.pdf>

In addition, it is clear that Medicaid recipients of TEFRA, i.e., disabled children living at home, are separate and distinct from Medicaid recipients of HCBS Waiver program. TEFRA regulation 7 AAC 100.424(b) states: “[e]ligibility under this section does not authorize home and community-based waiver services under 7 AAC 130. A child determined eligible under this section who subsequently is separately determined eligible for home and community-based waiver services must be converted to an appropriate alternative eligibility category.”

## ANALYSIS

### I. Issue

On July 19, 2011, was the Division correct to terminate Claimant’s receipt of Medicaid TEFRA benefits because he “no longer meets the level of care criteria” for eligibility?

### II. Burden of Proof and Standard of Proof

It is undisputed that Claimant’s Medicaid TEFRA benefits will terminate as a consequence of the Division’s determination, if found correct in this decision.<sup>12</sup> Therefore, this case involves a termination of benefits. The Division has the burden of proof because the Division must “continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible.” 42 C.F.R. § 435.930. Also, the Division has the burden of proof by a preponderance of the evidence because it is seeking to terminate benefits which would be a change of the status quo. *See, State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

### III. The Issue in Dispute

The parties could not agree on the issue in dispute, except that it involved the termination of Claimant’s eligibility for TEFRA benefits, provided to a disabled child living at home authorized by 7 AAC 100.424. The Division’s representative argued the issue was that Claimant no longer required the level of care

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<sup>12</sup> The Division “accepts the burden of proof” on grounds that it initiated the eligibility review. Division’s Closing Statement and Reply, at p. 3.

provided by an ICF/MR facility. Claimant's representative argued the issue was whether Claimant had a qualifying diagnosis (of mental retardation or a condition closely related to mental retardation).

There is no inherent conflict between the two arguments. Regulation 7 AAC 100.424, as applied to the facts of this case, requires the Division to determine first, if the child needs a level of care that he would receive in an ICF/MR facility (7 AAC 100.424(a)(5)(B)); and second, by express incorporation of 7 AAC 140.600, whether the child has a diagnosis of mental retardation, per 7 AAC 140.600(c)(1) or a condition found to be closely related to mental retardation, per 7 AAC 140.600(c)(2).

IV. The Division incorrectly terminated Claimant's TEFRA eligibility because Claimant did not have a qualifying diagnosis of mental retardation. (7 AAC 140.600(c)(1)).

The Division of Public Assistance terminated Claimant's eligibility for TEFRA benefits because the Division of Senior and Disabilities Services (Division or DSDS) determined he did not need the level of care provided by an intermediate care facility for the mentally retarded (ICF/MR). DSDS determined Claimant did not have a diagnosis qualifying him for the ICF/MR level of care by relying on the IQ score of 80 that was attributed to Claimant on the Kaufman Brief Intelligence Test-2 (Kaufman). This test was administered to Claimant in November 2010 by the Anchorage School District School Psychologist. The Division's Reviewer determined that the Kaufman IQ test results of 80 precluded Claimant from having a diagnosis of mental retardation, because a score of 70, plus 5 points, is the definition of mental retardation. Regulation 7 AAC 140.600(c)(1) provides (in part) that to be diagnosed with mental retardation:

the recipient must have an intelligence quotient of 70 points or less as determined by an individual, standardized psychological evaluation, plus up to five points to account for any measurement error;....

The Division argued that absent a diagnosis of mental retardation meeting 7 AAC 140.600(c)(1), Claimant cannot not qualify for ICF/MR. If Claimant does not qualify for ICF/MR, then he cannot be eligible the Medicaid benefits of TEFRA because he does not meet the requirement of 7 AAC 100.424(a)(5)(B).

Thus, the Division's determination rests on Claimant's IQ score of 80 on the Kaufman test. Evaluation of this test score discloses it is unreliable, at best.

First, the composite IQ score of 80 appears mistaken in relation to the scores reported for the Kaufman test itself. *See* Finding of Fact 5. Examining the Kaufman test scores, not only do the verbal (84) and non-verbal (81) scores exceed the composite score (80), but also the verbal percentile (14<sup>th</sup>) and non-verbal percentile (10<sup>th</sup>) exceed the composite percentile (9<sup>th</sup>). There is no explanation of how the composite scores are attained or why they would not arithmetically relate to the other scores. Neither party provided evidence aiding interpretation of the Kaufman test scores. No explanation is provided with the Kaufman test excerpt provided as an exhibit. When asked, the Reviewer stated it was not her function to question test scores or to ascertain if the test results were valid. However, these scores do not make sense. The Reviewer did not explain how they made sense to her. The Reviewer accepted the IQ composite score of 80 without question.

Second, the November 29, 2010 Kaufman IQ score of 80 is aberrant when compared to all of Claimant's other IQ scores, and especially his test results from June and July 2010. Claimant's history of IQ scores, over a period of seven years of a 13 year old boy's life, ranged from 54 in 2003, to  $68 \pm 5$  in 2006, to "invalid due to poor effort, low frustration tolerance and ... struggles with sustained attention" in June/July 2010. In sharp contrast, the Anchorage School District Kaufman "ability assessment," as the evaluating School Psychologist described it, yielded a IQ score of 80 in November 2010, merely four months later. These facts compel skepticism, and critical examination of the aberrant score.

Although the Reviewer's function may not include challenging test scores, a reviewer's obligation when determining eligibility for continued benefits necessarily includes exercising professional judgment about the information being reviewed. "Professional judgment must be exercised in each case ...." *Garner v. State, Dep't of Health & Soc. Servs*, 63 P.3d 264, 269 (Alaska 2003) In this case, it appears the Reviewer did not think sufficiently about the significance of the information she reviewed.

Third, the Kaufman IQ score of 80 was obtained in November 2010 from a boy who is described not only as cooperative, but who put forth "good effort," was "engaged and focused," and "expressed interest in trying" an additional question on three sub-tests, and even tried four difficult additional questions. *See* Finding of Fact 4(b). This description contrasts sharply with the report of July 2010, four months earlier, that Claimant was unable to produce a valid result on a Wechsler Intelligence Scale for Children IQ test "due to poor effort, low frustration tolerance" and "struggles with sustained attention." *See* Finding of Fact 6d. Also, the description of the test subject yielding the Kaufman score is substantially different from the description of Claimant by professionals who tested or taught Claimant in 2003, 2006, September 2010, October – November 2010, and December 2010. (*See* Finding of Fact 6, 9, 10, 11, 12, 14.) Such disparate descriptions of the test subject compel further investigation, as well as skepticism as to the reliability of the November 2010 Kaufman test results, at minimum.

The sudden, dramatic increase in IQ score, as well as the substantially different behavior described of the child tested, together, are persuasive the Kaufman test IQ score of 80 is unreliable.

Fourth, it appears the Kaufman test may be an inappropriate basis on which to determine if Claimant has a diagnosis of mental retardation. The Kaufman test, which yielded the IQ score of 80, is described by the School Psychologist administering the test as an "ability assessment." *See* Finding of Fact 5b, c. It was described as requiring "minimal verbal responses, and no writing." *See* Finding of Fact 5c. It is unclear how the Kaufman "ability assessment" results were obtained.

Also, there is no evidence to explain that the Kaufman assessment is comparable to the intelligence testing of the other "traditional" IQ tests. The Reviewer did not compare the Kaufman Brief Intelligence Test score to Claimant's previous scores from traditional IQ tests, the Stanford Binet or Wechsler Intelligence tests, because she was relying on current information. Without understanding the difference between the Kaufman assessment and the previous intelligence quotient tests, the Reviewer likely would be unable to evaluate the aberrant IQ score of 80 on the Kaufman assessment.

Finally, the Kaufman Brief Intelligence Test was administered for purposes of preparing an Individual Education Plan (IEP) and not to determine if Claimant had a qualifying diagnosis of mental retardation satisfactory to continue his receipt of Medicaid TEFRA benefits. *See* Finding of Fact 4.

For all of these reasons, the Reviewer was incorrect to place determinative weight on the November 2010 Anchorage School District Kaufman Brief Intelligence Test IQ score of 80. The Division erred in determining Claimant was not diagnosed with mental retardation on this basis.

V. The Division incorrectly terminated Claimant's TEFRA eligibility because Claimant did not have a condition closely related to mental retardation. (7 AAC 140.600(c)(2))

Claimant argued the Division erred in terminating his eligibility for benefits on grounds he “does not have a diagnosed condition closely related to Mental Retardation.” See Finding of Fact 2c and 3. Claimant's care coordinator identified this condition as a specific diagnosis on Claimant's ICAP demographic form. The form accompanied his consent to release information for an ICAP assessment. See Finding of Fact 4, n. 5. This diagnosis addresses the ICF/MR level of care eligibility category of 7 AAC 140.600(c)(2)(B) (a condition that is closely related to mental retardation because that condition results in impairment of general intellectual function and adaptive behavior similar to that of individuals with mental retardation...). Clearly, Claimant anticipated the review of his eligibility would consider if he met the requirements of 7 AAC 140.600(c)(2)(B).

The Division's Reviewer testified she considered all the documentation provided by Claimant, reproduced as Exhibit E. The Reviewer acknowledged she reviewed substantial non-IQ related information that had been provided in Exhibit E. The Reviewer testified that adaptive functioning is considered in determining if a child has a condition related to mental retardation. However, the Reviewer considered the non-IQ information to show Claimant was delayed academically. She considered the information not related to Claimant's adaptive functioning. The Reviewer did not find a diagnosis for any condition she believed would be closely related to mental retardation. Thus, she determined Claimant did not meet the eligibility criteria of 7 AAC 140.600(c)(2)(B) (a condition found to be closely related to mental retardation).

Claimant's medical information, as compiled by the Anchorage School District in its Summary, was prepared for purposes of creating an Individual Education Program. Necessarily, this Summary targeted information related to education. Much of this information pertains to Claimant's academic skills, scores, and needs. See Finding of Fact 11 – 14. However, there is some information concerning Claimant's adaptive skills. See Finding of Fact 10. The Reviewer testified that Claimant's low scores on the adaptive categories of Communication, Daily Living, Social, and the Composite scores, related to academic delays and was not persuasive Claimant suffered deficits in adaptive functioning.

The scant information concerning Claimant's adaptive functioning rests in part on the absence of the ICAP assessment. The Inventory for Client and Agency Planning (ICAP) assessment could have provided current information concerning Claimant's adaptive functioning. The Division's ability to determine if Claimant's current needs arise from a condition “closely related to mental retardation” was undermined by the absence of information resulting from an ICAP assessment. This absence is discussed below.

The Division of Public Assistance (DPA) has the ultimate responsibility for determining eligibility for TEFRA benefits. The DPA accomplishes this, in part, by delegation of responsibilities to Qualis Health and the Division of Senior and Disabilities Services. DPA policies describing its delegation and associated duties is found in the DPA Aged, Disabled and Long Term Care Medicaid Eligibility Manual (Manual) at § 533. DPA Manual § 533 E. 3. describes the level of care (LOC) renewal process. It

specifies that for ICF/MR level of care cases, “Qualis Health will make a referral to DSDS for an ICAP evaluation.” When the ICAP is completed, DSDS then forwards the results to Qualis Health.

In this case, Claimant clearly anticipated an ICAP evaluation because he provided the demographic form and consent forms to have it conducted. *See* Finding of Fact 4, n. 5. As a matter of DPA policy the ICAP evaluation is required as part of the level of care review when eligibility is being reviewed to determine if benefits are to be continued. DPA Manual § 533 E. 3 DPA policy does not provide any exceptions to the ICAP assessment, nor make the ICAP assessment contingent on the presence or absence of a qualifying diagnosis.

It is undisputed that Claimant was denied an ICAP assessment because the Reviewer determined he was not diagnosed as mentally retarded and he lacked a diagnosis qualifying him for the ICF/MR level of care. DPA policy was not followed in the case of Claimant’s TEFRA eligibility review.

The absence of information provided from an ICAP assessment resulted in the absence of pertinent information on which basis Claimant’s diagnosis of “other MR like condition” might have been reviewed. Claimant was deprived of an opportunity to prove he met the eligibility criteria of having a condition closely related to mental retardation. Therefore, the Division was incorrect to terminate Claimant’s eligibility for TEFRA benefits on grounds Claimant did not meet the ICF/MR level of care because he did not show he had a condition that is found to be closely related to mental retardation.

#### VI. DPA policy requires the (Inventory for Client and Agency Planning) ICAP assessment.

Policies concerning eligibility determinations applicable to continued receipt of TEFRA benefits are identified in the portion of DPA Policy and Procedures manual titled “Aged, Disabled and Long Term Care Medicaid Eligibility Manual (Manual) at section 533. *See* Principles of Law above. As discussed above, the DPA delegates to DSDS the responsibility of determining if a Medicaid recipient receiving benefits under TEFRA (7 AAC 100.424) continues to be eligible for those benefits.

The parties agree that Claimant’s TEFRA eligibility review required DSDS to determine if he still needed the level of care equivalent to an intermediate care facility for the mentally retarded (ICF/MR). Therefore, DPA Aged, Disabled and Long Term Care Medicaid Eligibility Manual (Manual) § 533 E applies to this case. Manual § 533E. 3. requires completion of a level of care review (unless refused by the parents) including “referral to DSDS for an ICAP evaluation.” It is undisputed that an ICAP was not completed for Claimant in this case. The DPA policy and procedures manual does not provide any exception from this requirement. It is unclear why Claimant was deprived of an ICAP assessment.

DPA has delegated its responsibility for a level of care eligibility review to the Division of Senior and Disabilities Services (DSDS) and DSDS must apply DPA policies in conducting the review. DSDS has no policies or procedures identified as applicable to TEFRA reviews and therefore there is no potential for conflict between DSDS policies and those of DPA.<sup>13</sup>

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<sup>13</sup> DSDS policies and procedures apply to Intellectual and Developmental Disabilities (IDD) Program Eligibility and Enrollment and are identified as pertaining to the Home and Community-Based Services (HCBS) Waiver program. (*See* Exhibit B, pp. 42-53) TEFRA regulation 7 AAC 100.424(b) expressly states eligibility for TEFRA does not authorize eligibility for the HCBS Waiver program. The DSDS policies and procedures do not apply in this case. The terminology of

When reviewing the level of care eligibility factors for recipients receiving Medicaid TEFRA benefits, the ICAP is an essential part of the process. Under the facts of this case the ICAP assessment is of special importance in reviewing Claimant's eligibility for an ICF/MR level of care. The Division failed to act in accordance with a policy mandated as applicable to reviews of TEFRA eligibility. Therefore, the Division was incorrect to determine that Claimant did not meet eligibility criteria based on the absence of information which the ICAP assessment was expected to produce.

## VII. Procedural Matter: Notice

Claimant argued, in effect, that the denial notice was defective because it failed to inform Claimant of the Division's determination in such a way that Claimant could fairly meet and challenge the Division's decision. (Claimant's Responsive Post-Hearing Memorandum, at page 2) Claimant argument is persuasive.

In its denial notice, the DPA explained why Claimant's "level of care approval is terminated":

Documentation submitted indicates that [Claimant] does not have any of the qualifying diagnoses listed above and does not have a diagnosed condition closely related to Mental Retardation. Therefore, [Claimant] does not meet the criteria for a qualifying diagnosis for the ICF/MR level of care.

Claimant's ability to protect himself from agency error was undermined by the absence of facts in the denial notice. The absence of facts made it impossible for Claimant to understand how the Division reached its conclusion and impaired Claimant's ability to challenge the determination at the hearing. Otherwise stated, a literal reading of the grounds for denial does not provide Claimant with information identifying the bases on which the Division drew its conclusion. The denial notice iterates the legal standards on which the determination was made, and informs Claimant of the Division's conclusion, but not of its reasoning or of the facts, medical evidence, etc. on which the Reviewer relied.

In *Allen v. State, Dep't of Health & Soc. Servs.*, 203 P.3d 1155 (Alaska 2009) the Alaska Supreme Court wrote that "[d]ue process requires that benefit recipients be given 'timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend' before their benefits are reduced or terminated, in order to afford them protection from 'agency error and arbitrariness.'" *Id.* at 1167. The *Allen* court cited a seminal procedural due process case, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), in support of its decision. The *Mathews* decision instructed government agencies to consider the reasonable burden placed on an agency versus the risk of erroneously depriving a recipient of a benefit, when an agency gives notice of its action(s). Government agencies must meet procedural due process obligations.

In this case, the Division's pithy language of its denial notice did not meet the requirements of due process, as established by the Alaska Supreme Court and expressed in *Allen*. The denial notice provided Claimant with notice of the conclusion the Division reached, but not of its reasoning. No fact appears in

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Intellectual and Developmental Disabilities (IDD) has the same meaning as developmentally disabled or mentally retarded. The language is being changed to accommodate changes in cultural sensitivities.

the denial notice that would give Claimant “adequate notice detailing the reasons” for the Division’s conclusion.

Therefore, the Division failed to give adequate notice concerning its determination. The remedy for this kind of failure may be to remand the case to the agency so that it may cure its defective notice. However, in this case, the Division’s determination to terminate Claimant’s eligibility for TEFRA has been found incorrect on other grounds. Therefore, remand for the purpose of correcting the notice deficiency is not appropriate.

### **CONCLUSIONS OF LAW**

1. The Division of Public Assistance did not meet its burden of proving by a preponderance of the evidence that Claimant no longer requires the level of care that he would receive in an intermediate care facility for the mentally retarded. 7 AAC 100.414; 42 C.F.R. § 435.225.
2. The Division of Public Assistance did not meet its burden of proof by a preponderance of the evidence that Claimant no longer was eligible for Medicaid benefits under TEFRA regulation 7 AAC 100.424:
  - a. For lack of a qualifying diagnosis; (7 AAC 140.600(c)(1).
  - b. For lack of showing Claimant has a condition found to be closely related to mental retardation. (7 AAC 140.600(c)(2)(B)
3. The Division of Senior and Disabilities’ (DSDS) failure to administer the Inventory for Client and Agency Planning (ICAP) did not follow DPA policy applicable to DPA’s delegated responsibility of reviewing Claimant’s eligibility for Medicaid TEFRA benefits. (Aged, Disabled and Long Term Care Medicaid Eligibility Manual (Manual) at § 533 E. 3.)
4. The State must “continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible.” (42 C.F.R. § 435.930.) Therefore, the Division of Public Assistance must continue to provide Claimant with TEFRA benefits until it meets its burden of proving Claimant no longer is eligible for TEFRA benefits provided through 7 AAC 100.424.

### **DECISION**

On July 19, 2011, the Division was not correct to terminate Claimant’s Medicaid benefits received through the TEFRA program.

### **APPEAL RIGHTS**

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

