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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. 10-FH-2204
)
 Claimant.) Div. Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED], the parents of [REDACTED] (hereinafter "Claimant"), a minor child, applied for Medicaid benefits on her behalf under the TEFRA¹ category of the Medicaid program (TEFRA).² On June 1, 2010 the Division of Public Assistance sent the Claimant's parents notice her application was denied. (Ex. D) The Claimant requested a fair hearing contesting the denial on June 4, 2010. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant's hearing began on August 2, 2010. It was continued until August 18, 2010 at the Claimant's request.

The Claimant's mother appeared telephonically on the Claimant's behalf, on August 2, 2010. The Claimant's mother and father appeared telephonically on the Claimant's behalf on August 18, 2010. They represented the Claimant and testified on her behalf. [REDACTED] [REDACTED] also appeared telephonically and testified on the Claimant's behalf on August 18, 2010.

[REDACTED], a Health Program Manager III employed with the Division of Health Care Services, appeared in person on both hearing dates and represented the Division.

¹ TEFRA is the acronym for the legislation that authorized this category of Medicaid coverage, section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (PL 97-248); 42 USC 1396a.

² The record does not indicate the exact date of the Claimant's application.

██████████, who is employed by the Division of Senior and Disabilities Services (Division), appeared in person on both hearing dates and testified on behalf of the Division.

ISSUE

Was the Division correct to deny the Claimant's TEFRA Medicaid application on June 1, 2010, because she did not have a qualifying diagnosis?

FINDINGS OF FACT

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

1. Claimant is currently 10 years old (date of birth ██████████). (Ex. E, p. 2)
2. Dr. ██████████, Ph.D., a Clinical Neuropsychologist, performed a neuropsychological examination of the Claimant over the course of three days in December 2009 (December 8, 15, and 22). (Ex. E, pp. 2 - 11) She evaluated the Claimant using the following tools:

Wechsler Intelligence Scale for Children
Woodcock-Johnson Test of Achievement
Conners' Continuous Performance Test
NEPSY Development Neuropsychological Assessment
Beery VMI
California Verbal Learning Test – Children's Version
Rey-Osterrieth Complex Figure Test
D-KEFS Trail-Making Test
Wisconsin Card-Sorting Test
Rorschach Inkblot Test
Behavior Assessment System for Children – Parent and Teacher Reports
Adaptive Behavior Assessment System – Parent and Teacher Reports

(Ex. E, p. 2)

3. Dr. ██████████ undated Neuropsychological Evaluation³ summarizes the Claimant's test results. (Ex. E, pp. 4 – 9) That comprehensive 10 page report also notes the following:
 - a. The Claimant “met early motor and speech milestones within expected age ranges.” (Ex. E, p. 3)

³ There is no date on the actual report, merely an indication that the evaluation dates were December 8, 15, and 22, 2009. (Ex. E, p. 2)

- b. The Claimant “received speech services prior to entering kindergarten.” (Ex. E, p. 3)
 - c. “Her performance across measures of vocabulary and verbal reasoning was consistently in the average range.” (Ex. E, p. 5)
 - d. The Claimant’s “verbal abilities are generally in the average range.” (Ex. E, p. 9)
 - e. “Academic testing showed adequate reading and writing skills combined with moderate deficits in mathematics, particularly those related to conceptual reasoning.” (Ex. E, p. 9)
4. Dr. ██████ Neuropsychological Evaluation concludes that the Claimant “demonstrates a pattern of cognitive strengths and weaknesses consistent with a diagnosis of Asperger’s.” (Ex. E, p. 10) Dr. ██████ then diagnosed the Claimant with Asperger’s Disorder, Code 299.8. (Ex. E, p. 10)
5. On July 14, 2010, the Claimant was examined by Dr. ██████, D.O. (Ex. G, pp. 1 – 2) Dr. ██████ met with the Claimant for approximately 60 minutes and reviewed Dr. ██████’s neuropsychological evaluation. *Id.* Dr. ██████’s two page report contains a very brief summary of Dr. ██████’s statements and does not indicate that he administered any tests to the Claimant. *Id.* His report states that the Claimant’s “speech and social milestones were distinctly delayed, although she has caught up to her age range and speech at this time.” (Ex. G, p. 1)
6. After his examination, Dr. ██████ diagnosed the Claimant with Autism Spectrum Disorder, Code 299.00.⁴ (Ex. G, p. 2)
7. On July 14, 2010, Dr. ██████ completed a “Qualifying Diagnosis Certification” form (form 300-1-E) where he diagnosed the Claimant with “Autistic Disorder 299.00 (according to the DSM-IV-TR).” (Ex. F, p. 1). On that form, he checked the boxes that indicated her condition had manifested before she was 22 years old, it was likely to continue indefinitely, and that it “constitute[d] a substantial disability to the individual’s ability to function in society.” *Id.*
8. ██████ is a Qualified Mental Retardation Professional employed by the Division. She has a bachelor’s degree in psychology, a Master’s degree in education and counseling psychology, and has completed other graduate work. (██████ testimony) Ms. ██████ did not disagree with Dr. ██████’s Asperger’s Disorder diagnosis (Code 299.8). She disagreed with Dr. ██████’s Autistic Disorder diagnosis (Code 299.00), in part, because the Claimant’s language skills were higher than would support an Autistic Disorder diagnosis (Code 299.00). (██████ testimony) She stated

⁴ A code of 299.00 is, strictly speaking, an Autistic Disorder diagnosis. See the *Diagnostic and Statistical Manual of Mental Disorders* at pp. 70 – 75. (American Psychiatric Association, 4th Edition, 2000)

that Asperger's Disorder (Code 299.8) and Autistic Disorder (Code 299.00) were two very different diagnoses. (██████ testimony)

PRINCIPLES OF LAW

A party who is seeking a change in the status quo has the burden of proof by a preponderance of the evidence. *State, Alcohol 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).

TEFRA is a category of Medicaid coverage supplied to children under the age of 19, where the child does not qualify for federal Supplemental Security Income benefits "because of parental income or resources." 7 AAC 100.002(d)(5); 7 AAC 100.424(a). The Alaska Medicaid regulations require that a TEFRA child experience a disability, and reside at the child's parents' or legal guardian's home. 7 AAC 100.424(a)(2), (4). In addition, the child must "need[s] a level of care offered in . . . (B) an intermediate care facility for the mentally retarded, as determined under 7 AAC 140.600." 7 AAC 100.424(a)(5)(B).⁵

State Medicaid regulation 7 AAC 140.600⁶ sets out the requirements for determining whether a child must "need[s] a level of care offered in . . . (B) an intermediate care facility for the mentally retarded":

(c) In determining whether a recipient qualifies under this section for ICF/MR services, the department will base its decision on the determination of a qualified mental retardation professional within the department that the recipient meets the functional criteria in (d) of this section and that the recipient has at least one of the following criteria:

* * *

(5) autism that has been diagnosed by a mental health professional clinician and that meets the diagnostic criteria for code 299.00, as set out in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, adopted by reference in 7 AAC 160.900.

(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

⁵ While there are other requirements for TEFRA coverage, they do not apply to this case.

⁶ Individuals with cerebral palsy, mental retardation or conditions similar to mental retardation, or seizure disorders are also potentially eligible for Medicaid coverage under the TEFRA category. 7 AAC 140.600(c)(1) – (4).

(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.

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

In Medicaid cases, more weight is given to an examining physician's opinion than the opinions of a nonexamining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). An administrative law judge must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of an examining physician. *Id.* Even if an examining physician's opinion is contradicted by another physician, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." *Id.* at 830 – 831. "The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Id.* at 831 (emphasis in original).

ANALYSIS

The Claimant's position is that the Division erred when it found the Claimant did not have a necessary diagnosis to qualify for the TEFRA Medicaid category. Because this case involves an application for benefits, the Claimant has the burden of proof by a preponderance of the evidence.

The Claimant has two autism spectrum disorder diagnoses.⁷ The first diagnosis was for Asperger's Syndrome, *DSM IV - TR* Code 299.80. That diagnosis was made in December 2009 by Dr. [REDACTED], Ph.D. See Finding of Fact 4 above. The second diagnosis was for Autistic Disorder, *DSM IV - TR* Code 299.00. That second diagnosis was made on July 14, 2010 by Dr. [REDACTED], D.O. See Findings of Fact 6 - 7 above.

In order for the Claimant to qualify for TEFRA Medicaid, in this case, she must have "autism that has been diagnosed by a mental health professional clinician and that meets the diagnostic criteria for code 299.00, as set out in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*." 7 AAC 140.600(c)(5). Dr. [REDACTED]'s Asperger's Disorder (Code 299.80) diagnosis would not qualify. Dr. [REDACTED]'s Autistic Disorder (Code 299.00) diagnosis would qualify.

⁷ For an authoritative discussion on Autistic Disorder (Code 299.00) and Asperger's Disorder (Code 299.80), see the *Diagnostic and Statistical Manual of Mental Disorders* at pp. 70 – 75, 80 - 84 (American Psychiatric Association, 4th Edition, 2000) also commonly referred to as the *DSM IV - TR*. In very broad lay terms, Asperger's Disorder includes atypical or high functioning autistic behavior, i.e., it is not as severe a condition as Autistic Disorder.

The State objected to Dr. ██████'s Autistic Disorder diagnosis. It did not object to Dr. ██████'s Asperger's Disorder diagnosis. Dr. ██████ reviewed Dr. ██████'s December 15, 2009 neuropsychological evaluation in making his diagnosis. He examined the Claimant. He did not perform any other testing. However, on July 14, 2010, approximately 8 months after Dr. ██████'s diagnosis, he arrived at an Autistic Disorder diagnosis. *See* Findings of Fact 5 - 7 above.

Because both of the diagnoses were performed by examining doctors, they have equal weight. However, in order to accept one and reject the other, there must be "specific and legitimate reasons that are supported by substantial evidence in the record." *Lester* at 830 - 831.

A review of the two doctors' reports reveals that Dr. ██████'s evaluation of the Claimant took place over three days, and involved considerable test administration. *See* Finding of Fact 2 above. In contrast, Dr. ██████ only spent approximately 60 minutes with the Claimant. *See* Finding of Fact 5 above. In addition, Dr. ██████ reviewed Dr. ██████'s evaluation, but did not conduct any additional testing. *Id.*

Dr. ██████'s and Dr. ██████'s reports contain one slight factual difference. Dr. ██████ states that the Claimant met early "speech milestones within expected age ranges." *See* Finding of Fact 3(a) above. Dr. ██████ states that the Claimant's speech "milestones were distinctly delayed." *See* Finding of Fact 5 above. However, Dr. ██████ and Dr. ██████ concur that the Claimant's speech is not a current issue; ██████: "she has caught up to her age range and speech at this time;" ██████: "verbal abilities are generally in the average range." *See* Findings of Fact 3(d) and 5 above.

Ms. ██████'s testimony was beneficial in pointing out that one of the quantifiable differences between Asperger's Disorder and Autistic Disorder was speech development.⁸ She testified that the Claimant's language skills were higher than would support an Autistic Disorder diagnosis. A review of the *Diagnostic and Statistical Manual of Mental Disorders* supports her opinion. The *Diagnostic and Statistical Manual of Mental Disorders* specifically states that in Autistic Disorder, communication impairments are "marked and sustained and affect[s] both verbal and nonverbal skills." *Diagnostic and Statistical Manual of Mental Disorders* at 70. "**Asperger's Disorder** can be distinguished from Autistic Disorder by the lack of delay or deviance in early language development." *Id.* at 74. (Emphasis in original).

Overall, Dr. ██████'s diagnosis of Asperger's Disorder (Code 299.80) is more persuasive than Dr. ██████'s diagnosis of Autistic Disorder (Code 299.00). This is because Dr. ██████ spent substantially more time with the Claimant, administered tests to the Claimant, and analyzed the results of her tests, to arrive at her diagnosis. In contrast, Dr.

⁸ It is noted that Ms. ██████, who holds a Masters degree, is neither a treating physician nor an examining physician. As such, her opinion, on its own, cannot be used to reject Dr. ██████'s diagnosis. *See Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1996). However, her opinion is useful in distinguishing between the differing diagnoses made by the two examining doctors in this case.

█ spent approximately 60 minutes with the Claimant, did not administer additional tests, and reviewed Dr. █'s report. While there is a factual difference between the two doctors' reports, whether the Claimant had delayed speech development or not, both doctors agreed that the Claimant's speech is now within average range. This supports a conclusion that the Claimant, whose speech is currently average, does not have the language difficulties attendant with Autistic Disorder, and that Asperger's Disorder is the more appropriate diagnosis.

Because Dr. █'s diagnosis is more persuasive than Dr. █'s, the Claimant did not meet her burden of proof by a preponderance of the evidence. It is therefore accepted, for the purposes of this Decision, that the Claimant has a diagnosis of Asperger's Disorder (Code 299.80) as diagnosed by Dr. █ in December 2009.

A diagnosis of Asperger's Disorder (Code 299.80) is not a qualifying diagnosis for TEFRA Medicaid. *See* 7 AAC 140.600(c)(5). Because the Claimant does not have an appropriate qualifying diagnosis for TEFRA Medicaid, the Division was correct to deny her application for TEFRA Medicaid coverage.

CONCLUSIONS OF LAW

1. The Claimant did not meet her burden of proof in this case to establish that she had a qualifying diagnosis for the TEFRA category of Medicaid under 7 AAC 140.600(c)(5).
2. The Division was therefore correct when it denied the Claimant's application for TEFRA Medicaid services on June 1, 2010.

DECISION

Based upon a preponderance of the evidence, the Division was correct to deny the Claimant's application for TEFRA Medicaid coverage on June 1, 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. To do this, send a written request directly to:

Kimberli Poppe-Smart
Division of Senior and Disabilities Services
4501 Business Park Blvd., Suite 24
Anchorage, AK 99503-7167

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

DATED this 14th day of October 2010.

/Signed/
Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 14th day of October 2010,
true and correct copies of the foregoing were sent to:

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

And to the following by email:

[REDACTED], Hearing Representative
[REDACTED], Director
[REDACTED], Policy & Program Development
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training

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