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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-2427
	)	OHA Case No. 10-FH-2431
Claimant.	)	(consolidated)
	)	DSDS Case No. [redacted]

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) is a recipient of benefits through the Medicaid Home and Community-Based Waiver Services Program (hereafter "HCBW" or "Choice Waiver program")[1] (Ex. 5-38).[2] These services are provided by the State of Alaska Department of Health and Social Services, Division of Senior and Disabilities Services (hereafter "Division" or "DSDS). *Id.*

Among the specific types of services which the Claimant was receiving were Intensive Active Treatment ("IAT") services ([redacted] testimony; Exs. Z-1 – Z-8). The Claimant has received the type of IAT services at issue since 2008 ([redacted]), although there may have been gaps in service ([redacted] testimony).

On or about June 2, 2010 (Ex. E-9) the Claimant [3] completed a request to *amend* his existing Plan of Care ("POC") (Exs. E-4 – E-9). Among the services requested in the POC *amendment* were 90 units

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1 Specifically, the Claimant participates in a sub-program of the Choice Waiver program known as the Mental Retardation and Developmental Disabilities program or "MRDD" (Ex. D-1).

2 As explained in more detail below, this case began as two separate cases, which were later consolidated. Originally, the Division's exhibits in *both* cases were marked for identification as Exhibits A through E. This caused confusion once the cases were consolidated. Accordingly, the exhibits originally submitted by the Division in Case No. 10-FH-2427 were re-marked from their original letters A – E, to their new designation as Exhibits 1 – 5, respectively. For example, the exhibit page which was originally marked as "E-38" became "Ex. 5-38."

3 Because of the Claimant's age and disabilities, his mother, [redacted], acts on his behalf.

of Intensive Active Treatment (IAT) services (Exs. E-4, E-5). [4] The Claimant's POC *amendment request* was received by the Division on September 21, 2010 (Ex. E-2).

On or about August 4, 2010 (Ex.5-35) the Claimant completed a request to *renew* his Plan of Care ("POC"). Among the services requested in the POC *renewal* were 104 units of IAT (Ex. 5-5). The renewed POC was to begin November 1, 2010 and end August 4, 2011 (Ex. 5-6). The Claimant's POC *renewal* application was received by the Division on September 23, 2010 (Ex. 5-4).

On November 23, 2010 the Division mailed to the Claimant a notice stating that his POC *amendment request* had been denied as to 90 units of IAT (Exs. D-1 – D-3). The Claimant requested a fair hearing contesting the denial of the 90 units of IAT requested in his POC *amendment request* on December 6, 2010 (Ex. C-1).

On November 26, 2010 the Division mailed to the Claimant a notice stating that his POC *renewal application* had been denied as to the 104 units of IAT (Exs. 4-1 – 4-3). The Claimant requested a fair hearing contesting the denial of the 104 units of IAT requested in his POC renewal application on December 6, 2010 (Ex. 3-1).

This Office has jurisdiction to decide this case pursuant to 7 AAC 49.010.

The case involving the Claimant's POC *renewal request* (OHA Case No. 10-FH-2431) came on for hearing on January 11, 2011. At this hearing the parties requested that the Claimant's two cases be consolidated. This joint request was granted, and OHA Case No. 10-FH-2427 (regarding the Claimant's POC *amendment request*), and OHA Case No. 10-FH-2431 (regarding the Claimant's POC *renewal application*), were consolidated for all further proceedings by order dated January 12, 2011. The hearing in OHA Case No. 10-FH-2427 previously scheduled for January 24, 2011 was cancelled, and a joint hearing for both cases was scheduled for February 8, 2011.

The Claimant's hearing resumed as scheduled on February 8, 2011 before Hearing Examiner Jay Durych. The Claimant's mother, [redacted], attended the hearing in person, represented her son, and testified on his behalf. The Claimant's Care Coordinator, [redacted], attended the hearing in person and testified on the Claimant's behalf. [redacted], a Medical Assistance Administrator III for the State of Alaska Division of Health Care Services, attended the hearing in person and represented the Division. Also present for DSDS, as either witnesses or observers, were [redacted], Health Program Manager I for DSDS, and [redacted], Health Program Manager I for DSDS.

The hearing could not be concluded on February 8th and was continued to February 25, 2011. The same persons who attended the February 8th hearing attended the February 25th hearing. In addition, Dr. [redacted], N.D. participated in the hearing by phone and testified on the Claimant's behalf.

The witnesses' testimonies were received and all exhibits submitted were admitted into evidence. At the end of the hearing of February 25, 2011 the record was closed except for the submission of post-hearing filings. Two post-hearing filings were timely received from the Claimant on March 9 and

[4] Although the parties could not agree on how many units of IAT had been approved for the POC immediately preceding the one at issue here, it was not disputed that the number of units requested in the amendment was an increase when compared to the number of units previously authorized.

March 11, 2011. The Division's post-hearing filing was timely received on March 24, 2011. The record was then closed and the case became ripe for decision.

ISSUES

1. Was the Division correct to deny both the Claimant's *amendment request* and/or *renewal application* because:

   a. The Claimant's neurotherapy does not fall within the types of treatment authorized by 7 AAC 130.275(b)(1) because it is "medical," whereas the only services properly provided under IAT are "behavioral." 7 AAC 130.275(b)(1)?

   b. The Claimant's amendment request and renewal application were not supported by current documentation as required by 7 AAC 130.230(g)?

   c. The Claimant's amendment request and renewal application did not demonstrate that the Claimant had made full use of any available third-party resources, prior to applying for IAT services through the Choice Waiver program, as required by 7 AAC 160.200(a),(e)? [5]

2. Was the Division correct to deny the Claimant's *amendment request* because it sought retroactive POC approval, thereby violating the requirement for prior authorization of services under 7 AAC 130.275(a)(3)?

3. Was the Division correct to deny the Claimant's *renewal application* because it did not demonstrate that the IAT treatment / therapy requested would be performed or supervised by a person licensed under Title 8 of the Alaska Statutes, as required by 7 AAC 130.275(b)(3)?

SUMMARY OF DECISION

There are two issues which are common to *both* the *amendment request* and the *renewal application*. With regard to the first common issue, the Claimant's neurotherapy falls within the types of treatment authorized by 7 AAC 130.275(b)(1) because nothing in the regulation forbids the use of "medical" means to reach "behavioral" goals. With regard to the second common issue, the Claimant met his evidentiary burden and proved, by a preponderance of the evidence, that the Claimant's amendment request was supported by current documentation as required by 7 AAC 130.230(g).

With regard to the only issue unique to the *amendment request*, the Claimant's amendment request did seek retroactive POC approval, thereby violating the requirement for prior authorization of services under 7 AAC 130.275(a)(3). Although the Claimant asserted that the Division is estopped from enforcing the prior authorization requirement of 7 AAC 130.275(a)(3) on the facts of this case, the Claimant's estoppel defense is not supported by the applicable law.

With regard to the only issue unique to the *renewal application*, the Claimant met his evidentiary burden and proved, by a preponderance of the evidence, that the IAT treatment / therapy requested

[5] The Division ultimately conceded on this issue at hearing, as discussed below. However, because this was asserted as a basis of denial in the Division's denial letters and through the first two hearings, it is included here for the sake of completeness.

would be performed or supervised by a person licensed under Title 8 of the Alaska Statutes as required by 7 AAC 130.275(b)(3).

FINDINGS OF FACT

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

I. Relevant Background Information.

1. The Claimant was born in 1995 (Ex. 5-6) and was 15 years old at the time of the amendment and renewal requests at issue in this case. He has a primary diagnosis of autism, with secondary diagnoses of attention deficit / hyperactivity disorder, obsessive-compulsive disorder, intermittent explosive disorder, mood disorder, sleep disturbance, PICA, and profound cognitive delays (Ex. 5-7). These problems cause the Claimant to exhibit aggressive behaviors which can put the Claimant, and those near him, at risk of physical injury. *Id.* These behaviors began in 2003 ([redacted] testimony).

2. In January 2008 the Claimant underwent a neurological evaluation to determine possible brain dysfunction (Exs. AB-3, 5-8). A "QEEG brain map" was used to measure the functional / maturational level of the Claimant's ability to receive, process, integrate, learn, and express information, and to develop proper perceptions. *Id.*

3. QEEG brain mapping records electrical activity within the brain from 24 channels, provides a view of the dynamic changes taking place throughout the brain during task processing, and assists in determining which areas of the brain are not fully engaged and not processing efficiently (Ex. AB-3). The type of QEEG brain mapping used with the Claimant is called "Neurometrics". *Id.*

4. The evaluation was performed by a team which included a neurologist, an electro-physiologist, and a neuro-developmental psychologist. Exs. AB-4, 5-8). Based on this evaluation, it was determined that the Claimant's integrative processing, memory, attention, concentration, speed and extent of information processing, self-monitoring, auditory processing, self-control, problem solving, abstract thinking, emotional control, flexibility of thinking, inhibitions, motivation, organization, and ability to initiate, think flexibly, and complete tasks, were not normal. *Id.*

5. The Claimant subsequently engaged in neurotherapy, using "brain mapping" or "Neurometrics," under the care of Dr. [redacted], N.D. of the [redacted] Brain Center (Ex. 5-9, Exs. AG1 – AG-20). [6] The Claimant has demonstrated a marked improvement in his problem behaviors since 2008 ([redacted] testimony; [redacted] testimony; Ex. AD-1). The behavioral improvements are most likely due in part to the neurotherapy ([redacted] testimony).

II. Facts Relevant to Case Procedural History.

6. At some time prior to July 22, 2009 the Claimant submitted an amendment request for his 2008-2009 POC, with an effective date of July 1, 2009; *this was prior to the amendment request at issue in this case* (Exs. G-6, AB-4). The amendment included a request for IAT services consisting of

[6] Dr. [redacted] is a naturopathic physician (Ex. Y-3). Naturopathic physicians are licensed by the State of Alaska, Department of Commerce, Community, and Economic Development, Division of Corporations, Business, and Professional Licensing, pursuant to A.S.08.45.010 - A.S.08.45.200.

Neurometrics / neurotherapy. *Id.* The Division approved this POC amendment on July 22, 2009, with a retroactive POC start date of November 1, 2008 (Exs G-1 – G-8). For the 2009 waiver year, the Division approved 10 units of neurotherapy with Dr. [redacted] as part of the Claimant's POC ([redacted] testimony). These units were utilized by the Claimant ([redacted] testimony).

7. On March 11, 2010 Dr. [redacted] reported significant improvement as a result of this treatment (Ex. 5-9). This was confirmed by the Claimant's mother and support staff, who reported a significant decrease in the frequency, duration, and severity of the Claimant's negative behaviors. *Id.*

8. On or about June 2, 2010 (Ex. E-9) the Claimant's representatives signed a request to *amend* his current Plan of Care ("POC") (Exs. E-4 – E-9). This is the amendment request at issue in this case. The start date for the existing POC was November 1, 2009; the end date was October 31, 2010. *Id.* The proposed effective date of the amendment was March 5, 2010. *Id.* Among the services requested in the POC amendment were Intensive Active Treatment (IAT) services consisting of neurotherapy provided by Dr. [redacted] (Exs. E-4, E-5). The Claimant's POC amendment request was received by the Division on September 21, 2010 (Ex. E-2). [7]

9. On or about August 4, 2010 (Ex.5-35) the Claimant completed an application to *renew* his existing POC. *This is the renewal application at issue in this case.* The renewed POC was to begin November 1, 2010 and end August 4, 2011 (Ex. 5-6). At page 24 of his POC *renewal application* (Ex.5-28), the Claimant requested 104 units of IAT. The specific service for which funding was requested was "brain mapping." *Id.* The stated purpose of the brain mapping was to "measure brain function, associate the results with behavior, and make recommendations to improve brain performance." *Id.* The services were to consist of 72 sessions of 80 minutes each over a period of 40 weeks from November 1, 2010 through August 4, 2011 (Exs. 5-5, 5-28). The Claimant's POC *renewal* application was received by the Division on September 23, 2010 (Ex. 5-4). [8]

10. On September 24, 2010 the Division requested additional information with regard to the Claimant's *amendment request* (Ex. L-1). The Division's request included the following:

> (2) Add the goals and objectives to the Plan of Care . . . . (3) Please submit an [IAT] Plan completed and signed by a licensed clinician in the State of Alaska . . . . (4) Submit a copy of the clinician's license who signs the IAT Plan . . . .

11. On September 27, 2010 the Claimant's Care Coordinator advised the Division that she would provide the requested items as soon as received from the Claimant's doctor (Ex. M-1).

12. On October 4, 2010 the Claimant's Care Coordinator sent an e-mail to the Division which stated in relevant part as follows (Ex. N-1):

> Please advise, did you receive a copy of the report and treatment plan which was included in Dr. [redacted]'s letter? With the amendment, we submitted a very detailed report that included an assessment, identification of how the treatment has helped [the

[7] The almost four (4) month delay between the date of the signatures on the amendment request, and the date the amendment request was received by the Division, was not explained at hearing.

[8] The almost two (2) month delay between the date of the signatures on the renewal application, and the date the renewal application was received by the Division, was not explained at hearing.

> Claimant] thus far, where he is now, and what future treatment would look like . . . . So if you could get specific information on what is missing, that would be helpful. Otherwise, we are shooting in the dark.

13. There is no responsive e-mail or other evidence in the record to indicate that the Division *did not* receive the information referenced in the Care Coordinator's October 4, 2010 e-mail (Ex. N-1). There is also no responsive e-mail or other evidence in the record indicating that DSDS responded to the Care Coordinator's request for a specific statement as to what information the Division believed was still missing from the Claimant's amendment request and/or renewal application.

14. On October 27, 2010 the Division advised the Claimant that the deadline for submitting additional information in support of the amendment and renewal requests had been extended to November 3, 2010 (Ex. P-1).

15. The Claimant's Care Coordinator submitted new / re-dated information from Dr. [redacted], in support of the Claimant's POC amendment and renewal requests, at some time between November 3, 2010 and November 5, 2010 (Exs. Q-1, S-2, U-1, Y-1). The information was received by the Division on November 3, 2010 (Ex. Q-1).

16. On November 16, 2010 the Claimant's Care Coordinator sent an e-mail to the Division (Ex. R-1). The stated purpose of the e-mail was to confirm the Care Coordinator's understanding that the Division had rescinded a prior request for an IAT plan with goals and objectives signed by a licensed clinician in the State of Alaska, on the basis that these had already been provided by the Claimant. *Id.*

17. On November 19, 2010 the Claimant's Care Coordinator e-mailed the Division stating that in her view the Claimant's POC *amendment request* was complete as of October 25, 2010 (Ex. T-1).

18. On November 23, 2010 the Division sent an e-mail to the Claimant's Care Coordinator (Ex. U-1) which stated in relevant part as follows:

> Can you remind me about the IAT plan? The POC states it was attached to the renewal but I could not find it. Did you intend to use the same IAT plan that was used for [the Claimant's] amendment that was submitted to [the Division] on September 21, 2010?

19. On November 23, 2010 the Division mailed a notice to the Claimant stating that his June 2, 2010 POC *amendment request* had been denied as to 90 units of IAT (Exs. D-1 – D-3). The reasons for the Division's denial stated in the notice can be summarized as follows:

> a. The Division asserted that the Claimant's brain-mapping / neurotherapy did not satisfy 7 AAC 130.275(b)(1). That regulation requires that intensive active treatment services "provide specific treatment or therapy, in the form of time-limited interventions to address a family problem or a personal, social, behavioral, mental, or substance abuse disorder in order to maintain or improve effective functioning of the recipient . . . ." (Ex. D-1).
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> b. The Division asserted that current medical reports were required pursuant to 7 AAC 130.230(g) (Ex. D-2).
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> c. Regulation 7 AAC 160.200(a),(e) requires that a recipient make full use of any available third-party resources before the Division will pay for the requested service. The

Division asserted that the Claimant's application did not demonstrate that the Claimant had applied for funding from any available third party resources, or from regular / non-waiver Medicaid, prior to applying for IAT under the Choice Waiver program (Ex. D-2).

d. The Claimant's amendment request was submitted to the Division on September 21, 2010, but the requested services were to begin on March 5, 2010 (i.e. the request was retroactive). However, 7 AAC 130.275(a)(3) requires that IAT services receive prior authorization (Ex. D-2).

20. On November 26, 2010 the Division mailed a notice to the Claimant stating that his August 4, 2010 POC *renewal application* had been denied as to the 104 units of IAT (Exs. 4-1 – 4-3). The reasons for the Division's denial stated in the notice can be summarized as follows:

a. The Division asserted that the Claimant's brain-mapping / neurotherapy did not satisfy 7 AAC 130.275(b)(1). That regulation requires that intensive active treatment services "provide specific treatment or therapy, in the form of time-limited interventions to address a family problem or a personal, social, behavioral, mental, or substance abuse disorder in order to maintain or improve effective functioning of the recipient . . . ." (Ex. 4-1).

b. The Division asserted that current medical reports were required pursuant to 7 AAC 130.230(g) (Ex. 4-2). The Division asserted that the most current medical reports submitted in support of the application were from 2008.

c. The Division asserted that the Claimant's application did not demonstrate that the Claimant had applied for funding from any available third party resources, or from regular / non-waiver Medicaid, prior to applying for IAT under the Choice Waiver program (Ex. 4-2). Regulation 7 AAC 160.200(a),(e) requires that a recipient make full use of any available third-party resources before the Division will pay for the requested service.

d. Regulation 7 AAC 130.275(b)(3) requires that IAT treatments be performed or supervised by a person licensed under Title 8 of the Alaska Statutes. The Claimant's renewal application listed "Dr. [redacted]" as the provider of the IAT services. There was no indication in the Claimant's application that Dr. [redacted] was licensed as required by 7 AAC 130.275(b)(3) (Ex. 4-2).

III. Facts Relevant to Allocation of Burden of Proof.

21. Dr. [redacted] was approved to provide IAT for 2008 – 2009 but not 2009 – 2010 ([redacted] testimony). The Division paid for IAT services that were provided by Dr. [redacted] in 2008 and 2009 ([redacted] testimony). The Claimant's current amendment request and renewal application seek more units of IAT than had previously been granted by the Division ([redacted] testimony).

IV. Facts Relevant to Whether the Claimant's Neurotherapy Satisfies the Requirements of 7 AAC 130.275(b)(1).

22. The Division received Dr. [redacted]'s letter of November 3, 2010 in support of the Claimant's request for IAT services in the *renewal application* ([redacted] testimony). However, Ms. [redacted] interpreted the letter as insufficient because (she testified) it was a medical treatment plan rather than a behavioral support plan, and did not address the Claimant's 'specific needs". *Id.* She believes that the

Claimant's neurotherapy cannot be approved under IAT because it is a "medical treatment" rather than a "behavioral treatment" ([redacted] testimony).

23. Ms. [redacted] testified that there was no scientific evidence presented that Dr. [redacted]'s neurotherapy treatments were actually affecting the Claimant's *behavior* ([redacted] testimony). She testified that she herself was not qualified to make that determination. *Id.*

24. At the hearing of February 25, 2011 Dr. [redacted] credibly testified in relevant part as follows:

a. The neurotherapy is treating the Claimant's brain. This is medical treatment. However, behavior (such as depression) often has medical causes. Medically treating the Claimant's brain with neurotherapy has changed the electrical activity in the Claimant's brain and how it works. Electrical activity in the brain causes a physiological response, which can include specific behaviors. For this reason, it is most likely that the neurotherapy is at least a partial cause of the positive changes in the Claimant's behavior.

b. The lines between what were traditionally categorized separately as medical treatment, psychiatric / psychological treatment, and behavioral treatment, have blurred with modern advances in science. There is no longer any clear distinction between them.

V. Facts Relevant to Currency of Medical Reports.

25. The Division was provided with a copy of Dr. [redacted]'s letter / assessment, with an effective date of March 5, 2010, in conjunction with the *amendment request* (Ex. AB-5, [redacted] testimony). The Division considers supporting documentation dated within the last 12 months to be "relatively current" ([redacted] testimony).

26. On November 23, 2010 the Claimant's Care Coordinator requested that the Division use Dr. [redacted]'s letter / assessment, which was originally submitted in support of the Claimant's *amendment request*, to support the Claimant's *renewal application* as well (Ex. U-1). The Division did not object.

VI. Facts Relevant to Whether the Claimant Made Full Use of Available Third-Party Resources.

27. The Division conceded at the hearing of February 25, 2011 that the Claimant had properly sought payment through third-party resources prior to seeking funding through the Choice Waiver program ([redacted] testimony at 1:33:15). [9]

VII. Facts Relevant to Whether the Division Properly Denied the Claimant's Amendment Request Based on Lack of Prior Authorization.

28. The Claimant has received Choice Waiver services for 10 years ([redacted] testimony; Ex. AE-2). During this period, and particularly from 2007 – 2010, the Division often approved renewal applications and amendment requests that were back-dated / retroactive (i.e. which were technically

[9] The Claimant made reasonable efforts to secure alternate funding from the Claimant's private insurer, Blue Cross / Blue Shield, for the IAT services at issue in the amendment request and renewal application (Exs. AD-2 – AD-5, AE-2, AF-1 – AF-4; [redacted] testimony). However, the Claimant's attempts were not successful. *Id.* The Claimant could not obtain funding for the IAT services at issue in the amendment request and renewal application through "regular" (non-waiver) Medicaid because Dr. [redacted] "did not meet the requirements for regular Medicaid" ([redacted] testimony).

without prior authorization) (Exs. AB-5, AE-2, AJ-1 – AJ-12, AK-2). Sometimes the POC amendments and/or renewals were not even submitted to the Division prior to the Claimant receiving the services requested (Ex. AK-2). The POC amendment request and renewal application at issue in this case were therefore not unusual in this regard ([redacted] testimony Ex. AK-2).

29. Prior to the federal Medicaid audit of the Division's practices beginning in April 2009, the Division did approve POCs which were back-dated or retroactive and which included services that had previously been provided without prior authorization ([redacted] testimony). However, the Division discontinued this practice after the federal audit. *Id.*

30. The Claimant's mother and Care Coordinator went about submitting the amendment request and renewal application in the same way as in years past ([redacted] and [redacted] testimony). The Division did not advise the Claimant's legal representative or Care Coordinator, prior to their submission of the amendment request or renewal application at issue, that it would no longer approve POCs which were back-dated or retroactive and which included services that had previously been provided without prior authorization. *Id.*

VIII. Facts Relevant to Whether the Claimant's IAT Services Were Being Performed or Supervised by a Person Licensed Under Title 8 of the Alaska Statutes.

31. The IAT plan, and proof of Dr. [redacted]'s licensing status, were provided to the Division prior to November 16, 2010 ([redacted] testimony). The Claimant's POC *amendment request* referenced "Dr. [redacted], N.D." as the provider for the Claimant's IAT services (Ex. E-5). The Claimant's POC *renewal application* mistakenly referenced a "Dr. [redacted]" as the contact / provider for the Claimant's IAT services (Ex. 5-28). [10] However, the same application also referenced [redacted], N.D. (Ex. 5-10). Ms. [redacted] denied the renewal application in part because she could not determine if "Dr. [redacted]" was properly licensed ([redacted] testimony). There is no dispute that *Dr.* [redacted] was properly licensed. *Id.; see also* Ex. Y-3.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves two separate matters which were consolidated for hearing and decision. The first matter involves the Division's November 23, 2010 denial of the Claimant's POC *amendment request* as to 90 units of IAT (Exs. D-1 – D-3). The second matter involves the Division's November 26, 2010 denial of the Claimant's POC *renewal application* as to 104 units of IAT (Exs. 4-1 – 4-3).

The party seeking a change in the status quo or existing state of affairs normally bears the burden of proof. [11] The Claimant's current amendment request and renewal application (i.e. those at issue in this case) each seek more units of IAT than had previously been granted by the Division ([redacted] testimony). The Claimant is thus seeking to change the status quo by increasing the amount of his IAT benefits, and the Claimant therefore bears the burden of proof with regard to both the amendment request and the renewal application.

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10 The reference to "Dr. [redacted]" was a mistake ([redacted] testimony).

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

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case. [12] 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. [13]

II. The Medicaid Home and Community-Based Waiver Services Program – Relevant Regulations.

7 AAC 130.200 provides as follows:

> The purpose of 7 AAC 130.200 - 7 AAC 130.319 [i.e. the Waiver Services regulations] is to offer a choice between home and community-based waiver services and institutional care to aged, blind, physically or developmentally disabled, or mentally retarded persons who meet the eligibility criteria in 7 AAC 130.205.

With regard to the Plan of Care (POC), 7 AAC 130.230 provides in relevant part as follows:

> (c) After the level of care is established, the care coordinator shall (1) prepare, in writing, a plan of care addressing (A) the comprehensive needs of the recipient; (B) the availability of enrolled providers; (C) the types of services that have been agreed to by specific enrolled providers; (D) family and community supports; and (E) the number of units, frequency, projected duration, and projected cost of each home and community-based waiver service; (2) include in the plan of care an analysis of whether the type, amount, duration, and scope of services in the plan of care are consistent with the findings of the assessment in (b) of this section and with any other treatment plan for the recipient; (3) make a recommendation whether the services in the plan of care meet the identified needs of the recipient; *(4) support the plan of care with appropriate and contemporaneous documentation that (A) relates to each medical condition that places the recipient into a recipient category listed in 7 AAC 130.205(d)(1); and (B) describes, supports, or justifies the recipient's request and need for home and community-based waiver services;* and (5) present the plan of care to the department for consideration and approval, and for consideration and approval of the home and community-based waiver services requested in the plan of care. [Emphasis added].
>
> . . . .
>
> (f) The department will approve a plan of care if the department determines that each service listed on the plan of care (1) is of sufficient amount, duration, and scope to prevent institutionalization; *(2) is supported by the documentation required in (c)(4) of this section;* and (3) cannot be provided under 7 AAC 105 - 7 AAC 160, except as a

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12 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).

13 *Black's Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) ("Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true").

home and community-based waiver service under 7 AAC 130.200 - 7 AAC 130.319. [Emphasis added].

(g) A recipient's need for home and community-based waiver services must be reviewed annually using the same criteria used to determine initial eligibility under 7 AAC 130.205. A new assessment must be prepared in accordance with (b) of this section, and the recipient's plan of care must be changed accordingly . . . . *The care coordinator shall submit in writing, for the department's consideration and approval, any change to a recipient's plan of care, shall document the need for changes to the plan of care, and shall relate those changes to findings in the current assessment . . . . If the department determines that adequate documentation is not provided, the department may cap service levels at prior year levels, or reduce service levels to reflect the recipient's historical usage . . . . The department will approve changes to a plan of care if the department determines that* (1) the amount, scope, and duration of services to be provided will reasonably achieve the purposes of the plan of care, and are sufficient to prevent institutionalization; *(2) each service to be provided is supported by documentation as required by (c)(4) of this section*; and (3) the services to be provided are not otherwise covered under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service under 7 AAC 130.200 - 7 AAC 130.319. [Emphasis added].

7 AAC 130.275, titled "Intensive Active Treatment Services," provides in relevant part as follows:

(a) The department will pay for intensive active treatment services . . . . (2) that are approved under 7 AAC 130.230 as part of the recipient's plan of care; (3) *that receive prior authorization*; and (4) for which the professional providing or supervising the services submits *supporting documentation* [14] *to the department that the recipient needs immediate intervention to decelerate a condition or behavior regression that, if left untreated, would place the recipient at risk of institutionalization.* [Emphasis added].

(b) *The department will consider services to be intensive active treatment services if (1) the department determines them to provide specific treatment or therapy, in the form of time-limited interventions to address a family problem or a personal, social, behavioral, mental, or substance abuse disorder in order to maintain or improve effective functioning of the recipient . . . . (3) the treatment or therapy is designed and provided by a professional licensed under AS08 with expertise specific to the diagnosed condition, or by a paraprofessional licensed under AS08 if necessary and supervised by that professional.* [Emphasis added].

III. The "Reasonable Basis" Standard.

An agency's interpretation of its own regulation is reviewed under the reasonable basis standard. *Lauth v. State*, 12 P.3d 181, 184 (Alaska 2000). An agency's interpretation of its own regulations is deferred to unless the interpretation is "plainly erroneous and inconsistent with the regulation." Id.; *see also Squires v. Alaska Board of Architects, Engineers & Land Surveyors*, 205 P.3d 326 (Alaska 2009); *Hidden Heights Assisted Living, Inc. v. State, Dept. of Health and Social Services, Div. of Health Care*

[14] The "supporting documentation" referred to in 7 AAC 130.275(a)(4) is what the Division commonly refers to as the "Behavioral Support Plan" ([redacted]). No particular format is required. *Id.*

Services, 222 P.3d 258, 267-268 (Alaska 2009); and *Burke v. Houston Nana, L.L.C.*, 222 P.3d 851 (Alaska 2010).

IV. Application of the Doctrine of Estoppel Against a Government.

"Equitable estoppel applies against the government in favor of a private party if four elements are present in a case: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury." *Allen v. State, Department of Health & Social Services, Division of Public Assistance*, 203 P.3d 1155, 1164 (Alaska 2009).

Alaska cases indicate that the doctrine of estoppel cannot be applied against the government in circumstances in which the representations or conduct of the government was in violation of existing rules or regulations. *See Luper v. City of Wasilla*, 215 P.3d 342, 347-348 (Alaska 2009); *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

Cases from other jurisdictions indicate that estoppel will generally not be found against the government in the absence of affirmative misconduct. *See, e.g., Linkous v. United States*, 142 F.3d 271, 278 (5th Cir.1998). To constitute affirmative misconduct, the government's action must be more than mere mistake, negligence, or unexplained delay. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-20, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990); *Schweiker v. Hansen*, 450 U.S. 785, 788-90, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).

In *Cuppett & Weeks Nursing Home, Inc. v. Department of Health and Mental Hygiene*, 430 A.2d 875, 880 (Md. App. 1981), the Maryland court held that the Maryland Medicaid agency's delay in enforcing certain regulations did not preclude later enforcement of the regulations, and that the doctrine of estoppel did not bar such enforcement.

ANALYSIS

Introduction: Definition of Issues; Burden of Proof.

This case involves two separate matters which were consolidated for hearing and decision. The first matter involves the Division's November 23, 2010 denial of the Claimant's POC *amendment request* as to 90 units of IAT (Exs. D-1 – D-3). The second matter involves the Division's November 26, 2010 denial of the Claimant's POC *renewal application* as to 104 units of IAT. (Exs. 4-1 – 4-3).[15]

The bases on which the Division denied the Claimant's *amendment request*, and the bases on which the Division denied the Claimant's *renewal application*, are similar but not identical. The bases on which the Division denied the Claimant's *amendment request* were as follows (Exs. D-1 – D-3): [16]

[15] The specific number of hours of IAT services requested was not at issue with regard to either the amendment request or the renewal application.

[16] There was originally also the additional issue of whether the Claimant's amendment request demonstrated that the Claimant had made full use of any available third-party resources, prior to applying for IAT services through the Choice Waiver program, as required by 7 AAC 160.200(a),(e) (Ex. D-2). However, as noted in the Findings of Fact, above, this issue was ultimately conceded by the Division at hearing.

1. The Claimant's neurotherapy does not fall within the types of treatment authorized by 7 AAC 130.275(b)(1) because it is "medical," whereas the only services properly provided under IAT are "behavioral." 7 AAC 130.275(b)(1).

2. The Claimant's amendment request was not supported by current documentation as required by 7 AAC 130.230(g).

3. The Claimant's amendment request sought retroactive POC approval, thereby violating the requirement for prior authorization of services under 7 AAC 130.275(a)(3).

The bases on which the Division denied the Claimant's *renewal application* were as follows (Exs. 4-1 – 4-3): [17]

1. The Claimant's neurotherapy does not fall within the types of treatment authorized by 7 AAC 130.275(b)(1) because it is "medical," whereas the only services properly provided under IAT are "behavioral." 7 AAC 130.275(b)(1).

2. The Claimant's renewal application was not supported by current documentation as required by 7 AAC 130.230(g).

3. The Claimant's renewal application did not demonstrate that the IAT treatment / therapy requested would be performed or supervised by a person licensed under Title 8 of the Alaska Statutes as required by 7 AAC 130.275(b)(3).

Thus, the first two of the three bases of denial of the *amendment request* overlap with the first two of the three bases of denial of the renewal application.

This decision will first address the asserted bases for denial of the Claimant's *amendment request* in Analysis Section I. The decision will then address the asserted bases for denial of the Claimant's *renewal application* in Analysis Section II. Because the Claimant is the party seeking to change the status quo by increasing the amount of IAT benefits, the Claimant bears the burden of proof as to all factual issues (*see* Principles of Law, above).

I. Was The Division Correct to Deny the Claimant's POC Amendment Request for IAT Services?

A. Does the Claimant's Neurotherapy Fall Within the Types of Treatment Authorized by 7 AAC 130.275(b)(1)?

Regulation 7 AAC 130.275(b) provides in relevant part that the Division "will consider services to be intensive active treatment services if (1) the department determines them to provide specific treatment or therapy, in the form of time-limited interventions to address a family problem or a personal, social, behavioral, mental, or substance abuse disorder in order to maintain or improve effective functioning

[17] There was originally also the additional issue of whether the Claimant's renewal request demonstrated that the Claimant had made full use of any available third-party resources, prior to applying for IAT services through the Choice Waiver program, as required by 7 AAC 160.200(a),(e) (Ex. 4-2). However, as noted in the Findings of Fact, above, this issue was ultimately conceded by the Division at hearing.

of the recipient . . . ." Thus, based on the plain language of the regulation, the goal of IAT is to "maintain or improve effective functioning of the recipient." *Id.* This goal may be pursued through any "specific treatment or therapy" which is "time-limited" and meant to "address a family problem or a personal, social, behavioral, mental, or substance abuse disorder." *Id.*

The Division asserts that the Claimant's neurotherapy cannot be approved as IAT because it is a medical treatment, and that, pursuant to 7 AAC 130.275(b)(1), medical treatments cannot be used to treat behavioral or social disorders. [18] The Division asserts that Dr. [redacted]'s neurotherapy treatment is not designed to affect, and is not affecting, the Claimant's behavior. Accordingly, the Division asserts that the neurotherapy treatments at issue cannot be approved as IAT services under 7 AAC 130.275(b)(1). [19]

The Division's interpretation of regulation 7 AAC 130.275(b)(1) is reviewed under the reasonable basis standard. *Lauth v. State*, 12 P.3d 181, 184 (Alaska 2000). Pursuant to that standard, the Division's interpretation will be upheld unless the interpretation is "plainly erroneous and inconsistent with the regulation."

The "reasonable basis" standard is deferential. However, 7 AAC 130.275(b)(1) does not require that any particular *means* (i.e. medical treatment versus behavioral therapy, etc.) be employed. Rather, the regulation focuses on *the end result sought to be achieved* (i.e. "to address a family problem or a personal, social, behavioral, mental, or substance abuse disorder in order to maintain or improve effective functioning of the recipient"). Accordingly, the Division's interpretation of 7 AAC 130.275(b)(1), as forbidding the use of "medical" means to reach "behavioral" goals, is not supported by the language of the regulation and is therefore plainly erroneous.

At the hearing of February 25, 2011, Dr. [redacted] credibly testified that treating the Claimant's brain with neurotherapy has changed the electrical activity in the Claimant's brain and how it works, and that it is therefore likely that the neurotherapy is at least a partial cause of the positive changes in the Claimant's *behavior*. The Claimant's mother testified that the neurotherapy sessions correlated closely with improvements in the Claimant's *behavior*. This satisfies the requirements of 7 AAC 130.275(b)(1). Accordingly, the Division was not correct when it denied the Claimant's amendment request based on the assertion that the neurotherapy at issue did not relate to behavior as required by 7 AAC 130.275(b)(1).

B. Was the Claimant's Amendment Request Supported by Current Documentation as Required by 7 AAC 130.230(g)?

Regulation 7 AAC 130.230(g) clearly requires that POC amendments and renewals be supported by adequate documentation. However, the regulation does not expressly state exactly how current the supporting documentation must be.

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[18] The Claimant asserts that this argument cannot even be considered because it was not properly stated in either of the Division's denial letters ([redacted] testimony). However, it is not necessary to address this argument given the disposition of this case.

[19] The Division did not cite any authority or definition, in the regulations or otherwise, for what is "medical" versus what is "behavioral."

The Division was provided with a copy of Dr. [redacted]'s letter / assessment, with an effective date of March 5, 2010, in conjunction with the September 21, 2010 filing of the amendment request (Ex. AB-5, [redacted] testimony). At that time, Dr. [redacted]'s letter / assessment was less than seven months old.

At hearing, the Division's own witness stated that she considers supporting documentation dated within *the last 12 months* to be "relatively current" ([redacted] testimony). Dr. [redacted]'s seven-month-old letter / assessment was well within this twelve-month deadline. Accordingly, based on its own evidence, the Division was not correct to deny the Claimant's amendment request based on the assertion that the Claimant's supporting documentation was not current.

C. Did the Claimant's Amendment Request, Seeking Back-Dated / Retroactive POC Approval, Violate The Requirement For Prior Authorization Of Services Under 7 AAC 130.275(A)(3)?

The Claimant's POC amendment request was received by the Division on September 21, 2010 (Ex. E-2). However, the proposed *effective date* of the amendment was March 5, 2010, more than six (6) months earlier. *Id.*

Regulation 7 AAC 130.275(a) provides in relevant part that the Division "will pay for intensive active treatment services . . . (3) *that receive prior authorization* . . . ." The Claimant did not dispute that, on its face, 7 AAC 130.275(a) requires prior authorization before IAT services, for which the Division is asked to pay, are provided. Rather, the Claimant asserted what is in essence an estoppel argument: that the Division cannot assert the prior authorization requirement, in the context of the amendment request at issue, based on the Division's past practices.

"Equitable estoppel applies against the government in favor of a private party if four elements are present in a case: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury." *Allen v. State, Department of Health & Social Services, Division of Public Assistance*, 203 P.3d 1155, 1164 (Alaska 2009). Does the Claimant meet these criteria?

The Claimant has received Choice Waiver services for 10 years ([redacted] testimony; Ex. AE-2). During this period, and particularly from 2007 – 2010, the Division often approved renewal applications and amendment requests that were back-dated / retroactive (i.e. which were technically without prior authorization) (Exs. AB-5, AE-2, AJ-1 – AJ-12, AK-2, [redacted] and [redacted] testimony). Sometimes the POC amendments and/or renewals were not even submitted to the Division prior to the Claimant receiving the services requested (Ex. AK-2, [redacted] and [redacted] testimony).

The Division's witness confirmed that, prior to the federal Medicaid audit of the Division's practices beginning in April 2009, the Division did approve POCs which were back-dated or retroactive and which thereby included services that had been provided without prior authorization ([redacted] testimony). However, the Division discontinued this practice after the federal audit. *Id.*

The Claimant basically asserts that the Division's past practices, as discussed above, constitute an assertion of a position by the Division that time was not "of the essence" in the submission and approval of amendment requests and/or renewal applications, and that POCs could be approved retroactively, thereby circumventing the prior authorization requirement. However, judicial decisions exist which undercut the Claimant's estoppel argument.

First, two Alaska cases indicate that the doctrine of estoppel cannot be applied against the government in circumstances in which the representations or conduct of the government was in violation of existing rules or regulations. *See Luper v. City of Wasilla*, 215 P.3d 342, 347-348 (Alaska 2009); *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

Second, cases from other jurisdictions indicate that estoppel will generally not be found against the government in the absence of affirmative misconduct. *See, e.g., Linkous v. United States*, 142 F.3d 271, 278 (5th Cir.1998). To constitute affirmative misconduct, the government's action must be more than mere mistake, negligence, or unexplained delay. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-20, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990); *Schweiker v. Hansen*, 450 U.S. 785, 788-90, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). There is no evidence of affirmative misconduct by the Division in this case.

Finally, in *Cuppett & Weeks Nursing Home, Inc. v. Department of Health and Mental Hygiene*, 430 A.2d 875, 880 (Md. App. 1981), the Maryland court held that the Maryland Medicaid agency's delay in enforcing certain regulations did not preclude later enforcement of the regulations and that the doctrine of estoppel did not bar such enforcement.

Collectively, the foregoing cases indicate that estoppel should not be found, based on government delay in enforcing certain regulations, unless the government's delay in enforcement rises to the level of misconduct. That is not the situation in this case.

In summary, the Division is not estopped from enforcing regulation 7 AAC 130.275(a)(3) against the Claimant on the facts of this case. Approval of the Claimant's amendment request, given the months between the date services were proposed to be authorized, and the date the request was received by the Division, would violate 7 AAC 130.275(a)(3)'s prohibition against providing services without prior authorization. Accordingly, the Division was correct to deny the Claimant's amendment request on this basis. [20]

II. Was The Division Correct to Deny the Claimant's POC Renewal Application?

Two of the three bases on which the Division denied the Claimant's *renewal application* were the same as two of the three bases on which the Division denied the Claimant's amendment request, discussed above (Exs. 4-1 – 4-3). Accordingly, based on the analyses in Analysis Section I, above:

1. The Division was not correct to deny the Claimant's renewal application based on the assertion that his neurotherapy does not fall within the types of treatment authorized by 7 AAC 130.275(b)(1).

2. The Division was not correct to deny the Claimant's renewal application based on the assertion that it was not supported by current documentation as required by 7 AAC 130.230(g).

Accordingly, the only remaining issue with regard to the Claimant's *renewal application* is whether the application demonstrated that the IAT treatment / therapy requested would be performed or

[20] Had the Division not prevailed on the prior authorization issue, the Claimant would have been entitled to his POC amendment request. Accordingly, any IAT services provided between the date that the Claimant's amendment request was submitted, and the date that the Claimant's POC renewal takes effect, should be paid by Medicaid *because any such services would not be retroactive / provided without prior authorization*.

supervised by a person licensed under Title 8 of the Alaska Statutes as required by 7 AAC 130.275(b)(3).

The IAT plan, and proof of Dr. [redacted]'s licensing status, were provided to the Division prior to November 16, 2010 ([redacted] testimony). The Claimant's POC *amendment request* referenced "Dr. [redacted], N.D." as the provider for the Claimant's IAT services (Ex. E-5). The Claimant's POC *renewal application* mistakenly referenced a "Dr. [redacted]" as the contact / provider for the Claimant's IAT services (Ex. 5-28). [21] However, this *the same application also referenced* [redacted]*, N.D. as a provider (Ex. 5-10).*

There is no dispute that *Dr.* [redacted] was properly licensed. *Id.; see also* Ex. Y-3. Viewing the renewal application as a whole, and in conjunction with the Claimant's contemporaneously-submitted amendment request, it is reasonably clear that Dr. [redacted] is the physician providing the neurotherapy services. It is also clear that he is properly licensed. Accordingly, the Division was not correct to deny the Claimant's renewal application based on the assertion that the Claimant's renewal application did not demonstrate that the IAT treatment / therapy requested would be performed or supervised by a person licensed under Title 8 of the Alaska Statutes as required by 7 AAC 130.275(b)(3).

CONCLUSIONS OF LAW

I. The Claimant's Amendment Request.

1. The Claimant's neurotherapy falls within the types of treatment authorized by 7 AAC 130.275(b)(1) because nothing in the regulation forbids the use of "medical" means to reach "behavioral" goals.

2. The Claimant met his evidentiary burden and proved, by a preponderance of the evidence, that his amendment request was supported by current documentation as required by 7 AAC 130.230(g).

3. By seeking retroactive POC approval, the Claimant's amendment request violated the requirement for prior authorization of services under 7 AAC 130.275(a)(3). The Division is not estopped from enforcing the prior authorization requirement of 7 AAC 130.275(a)(3) on the facts of this case. Accordingly, the Division was correct to deny the Claimant's amendment request on this basis.

II. The Claimant's Renewal Application.

1. The Claimant's neurotherapy falls within the types of treatment authorized by 7 AAC 130.275(b)(1) because nothing in the regulation forbids the use of "medical" means to reach "behavioral" goals.

2. The Claimant met his evidentiary burden and proved, by a preponderance of the evidence, that:

a. The Claimant's renewal application was supported by current documentation as required by 7 AAC 130.230(g).

[21] The reference to "Dr. [redacted]" was a mistake ([redacted] testimony).

b. The Claimant's renewal application demonstrated that the IAT treatment / therapy requested would be performed or supervised by a person licensed under Title 8 of the Alaska Statutes as required by 7 AAC 130.275(b)(3).

DECISION

1. The Division was correct when on November 23, 2010 it denied the Claimant's June 2, 2010 *request to amend* his existing Plan of Care.

2. The Division was not correct when on November 26, 2010 it denied the Claimant's Plan of Care *renewal application* dated August 4, 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, Division of Senior and Disabilities Services
State of Alaska Department of Health and Social Services
550 West 8th Avenue
Anchorage, Alaska 99501

Dated this 18th day of May, 2011.

(signed)
_____
Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on May 18, 2011 copies of the foregoing 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 – Certified Mail, Return Receipt Requested
[redacted] – Claimant's Care Coordinator –
Via facsimile to 907-[redacted]

[redacted], DSDS Hearing Representative
[redacted], Director, DSDS
[redacted], Policy & Program Development
[redacted], Staff Development & Training
[redacted] Mattson, Eligibility Technician I

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