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

In The Matter Of:)
)
[redacted],) OHA Case No. 11-FH-2207
)
Claimant.) DSDS Case No. [redacted]
)
)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Medicaid benefits under the Home and Community-Based Waiver Services Program (hereafter "Waiver Program") on or about December 15, 2010 (Exs. F-1, F-5). [1] On April 26, 2011 the State of Alaska Division of Senior and Disabilities Services (DSDS or Division) determined that the Claimant did not meet the Level of Care (LOC) requirements for the Waiver program for the Mentally Retarded / Developmentally Disabled ("MRDD Waiver Program") (Ex. E-2). On that date, the Division mailed a notice to the Claimant stating that her application had been denied (specifically, that she was not eligible for the MRDD Waiver Program because she did not meet Level of Care requirements) (Exs. D-1, D-2). The Claimant requested a fair hearing contesting the Division's denial of MRDD eligibility on May 18, 2011 (Ex. C).

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

The Claimant's hearing began as scheduled on June 21, 2011 before Hearing Examiner Jay Durych. The Claimant participated in the hearing by phone. The Claimant was represented by [redacted], who participated by telephone. The Claimant's Care Coordinator, [redacted] of Hope Community Resources, also participated by phone on the Claimant's behalf. [redacted] attended the hearing in person and represented DSDS. [redacted] of DSDS attended the hearing in person as a witness for DSDS. Before proceeding with the merits of the case, the hearing was recessed to allow the parties to discuss the case informally off-the-record. Following these off-record discussions, the parties requested that the hearing be continued to allow the Division to address certain issues raised by the Claimant. The hearing was continued to June 28, 2011.

[1] Although the record does not appear to reflect the exact date of the Claimant's application, the specific application date is not required for the resolution of this matter.

The Claimant's hearing resumed on June 28, 2011. The Claimant participated in the hearing by phone and testified on her own behalf. [REDACTED] participated by phone, represented the Claimant, and testified on her behalf. [REDACTED] participated by phone and testified on the Claimant's behalf. [REDACTED] attended the hearing in person, represented DSDS, and testified on its behalf. DSDS assessor [REDACTED], and [REDACTED] of DSDS, attended the hearing in person and testified on behalf of DSDS.

The witnesses' testimonies were received and all exhibits submitted were admitted into evidence. At the end of the hearing the record was closed and the case became ripe for decision.

ISSUES

1. Was the Division correct when, on April 26, 2011, it denied the Claimant's application for Medicaid Home and Community-Based Waiver Services, based on the assertion that, as of the date of her assessment, the Claimant did not meet the required Level of Care for an Intermediate Care Facility for the Mentally Retarded? Specifically, was the Division correct to determine that the Claimant had a Broad Independence Domain Score of 537 on the Inventory for Client and Agency Planning (ICAP), and did not meet the required Level of Care for that reason?

2. Was the Division's administration of the ICAP flawed because the Division interviewed one person whom the Claimant did not specify (Mr. [REDACTED]) in place of one of the three persons whom the Claimant did specify (Mr. [REDACTED])?

3. Was the Division's administration of the ICAP flawed because the Division's ICAP assessor had previously dealt with the Claimant in a professional capacity?

SUMMARY OF DECISION

As applicant, the Claimant had the burden of proof in this case. However, she did not establish either that the Division failed to follow any applicable regulation or policies, or that her ICAP [2] assessment or score was incorrect. The Claimant did not have a Broad Independence Domain Score on the ICAP of 514 or less. In addition, the Claimant received an ICAP service score of 96, level 9, indicating a need for infrequent or no assistance for independent living. Accordingly, the Claimant failed to prove, by a preponderance of the evidence, that she required the level of care provided in a nursing facility or Intermediate Care Facility for the Mentally Retarded (ICF/MR) at the time of her assessment.

The Division has the discretion, under its regulations and policies, to substitute an ICAP interviewee of its choosing for an ICAP interviewee of the applicant's choosing in certain circumstances. The Division's interviewing of Mr. [REDACTED] in place of Mr. [REDACTED] was appropriate based on the particular facts of this case.

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[2] The Inventory for Client and Agency Planning (ICAP) is a functional assessment tool. Pursuant to regulations 7 AAC 130.230(b) and 7 AAC 140.600(d), the ICAP must be incorporated into the Division's determination of whether an applicant or recipient requires the level of care provided in a nursing facility or Intermediate Care Facility for the Mentally Retarded (ICF/MR). The ICF/MR Level of Care is used to determine eligibility for services under the MRDD Waiver Program and the TEFRA Program. *See* "Senior & Disabilities Services (SDS) Guidelines for the ICAP Process" at Ex. J-1.

The performance of an ICAP assessment by an assessor who has previously dealt with an applicant in a purely professional capacity does not present a conflict of interest or otherwise invalidate the assessment.

The Division was therefore correct when, on April 26, 2011, it denied the Claimant's application for participation in the Medicaid Home and Community-Based Waiver Services Program.

FINDINGS OF FACT

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

1. The Claimant is a 42 year old woman (Ex. F-11). She has completed 12 years of special education. *Id.* She is unemployed. *Id.* She has lived independently in her own apartment since age 18 (Ex. F-15).

2. On October 15 – 20, 2004 clinical psychologist ██████████, Ph.D. performed a psychological evaluation of the Claimant (Exs. F-6 – F-10). The Vineland adaptive behavior test was administered (Exs. F-8, F-9). The results indicated adaptive social functioning most similar to that of mentally retarded adults who do not live in residential facilities. *Id.* A Wechsler adult intelligence test was also administered (Ex. F-7). The Claimant's full-scale IQ score was 66, which is in the range of intellectual functioning diagnosed as mild mental retardation (Ex. F-7). Dr. ███ diagnosed the Claimant as having an ICD-9 code of 318 – 'Mild Mental Retardation" (Ex. F-9). Dr. ███ also assessed the Claimant as having a Global Assessment of Functioning (GAF) score of 40 (Ex. F-10).

3. On March 10, 2011 clinical neuropsychologist ██████████ performed a neuropsychological evaluation of the Claimant (Exs. F-11 – F-22; Exs. H-6 – H-17). During this evaluation Dr. ████ gathered information about the Claimant and administered approximately 14 different psychological tests (Ex. F-16).

4. The tests administered by Dr. ████ indicate that (a) the Claimant's reading skills are in the average (post-high school) range; (b) the Claimant's spelling skills are in the average (high school) range; and the Claimant's mathematics skills are in the borderline (4th grade) range (Exs. F-17, F-18).

5. In the area of independent living skills, the Claimant's performance was in the mildly impaired range, a level consistent with adults who require some form of ongoing supported living placement and guardianship for assistance with decision-making (Ex. F-18).

6. In the area of money management, the Claimant's performance was in the severely impaired range, below the first percentile, a level consistent with adults who require ongoing payee services (Ex. F-18).

7. In general, the Claimant's intellectual tests indicated "a pattern of borderline range general intellectual functioning that, in combination with adaptive functioning deficits, would still meet criteria for [a] diagnosis of mild mental retardation" (Exs. F-18, F-19).

8. Some of the Claimant's test scores were lower than should have been the case due to the Claimant's "poor effort" in completing some of the tests (Ex. F-19).

9. Based on his evaluation of the Claimant, Dr. [redacted] assessed the Claimant as having primary diagnoses of (a) “major depressive disorder – recurrent – moderate;” (b) “anxiety, state unspecified (agoraphobia, posttraumatic stress disorder);” and (c) “mild mental retardation” (Ex. F-20). [3]

10. Prior to December 22, 2009 the State of Alaska, Department of Administration, Office of Public Advocacy, Public Guardian Section (“OPA/PGS”), was the Claimant’s court-appointed legal guardian (Exs. F-23, H-2). However, on December 22, 2009 the Anchorage Superior Court terminated OPA/PSG as the Claimant’s guardian, but appointed OPA/PGS to serve as the Claimant’s conservator (Exs. F-23, F-24, H-2, and H-3). Thus, since that date, the Claimant has had a conservator but no guardian.

11. The Claimant applied for Medicaid benefits under the Home and Community-Based Waiver Services Program on or about December 15, 2010 (Exs. F-1, F-5). As part of that application, the Claimant signed a “Consent for ICAP Administration Form” (Ex. F-1). On that form, the Claimant confirmed (a) that she has received a copy of the brochure “Guidelines for the ICAP Process,” (b) that her Care Coordinator had explained to her the guidelines for the ICAP process; (c) that she understood the ICAP process; (d) that she understood that the responses from persons interviewed during the ICAP process had to be accurate and would be used in assessing her eligibility for services; (e) that she had been given the opportunity to ask questions about the ICAP process, and that all of her questions had been answered to her satisfaction; and (f) that she authorized DSDS to proceed with conducting the ICAP assessment (Ex. F-1).

12. One requirement for completion of the ICAP packet is the identification by the applicant of three persons who may be interviewed by DSDS ([redacted] testimony). The ICAP assessor asks the same set of questions, in the same format, to each of the three persons (interviewees). *Id.* The questions ask the interviewees to rate the applicant’s abilities in various areas. *Id.* The interviewees are asked to assign a score of 0 to 3 on each question. *Id.* The interviewees may also provide their own comments. *Id.*

13. According to the “Guidelines for the ICAP Process,” (Ex. J-5), the persons to be interviewed as part of the ICAP assessment should be familiar and knowledgeable about the applicant/recipient, see the applicant/recipient on a daily basis, have known the applicant/recipient for at least three months, and have knowledge of the applicant/recipient’s current skills and behaviors ([redacted] testimony).

14. Interviewing three different persons gives DSDS a good sampling of an applicant’s functional abilities because each of the persons interviewed know the applicant in a different capacity and thus know different things about the applicant ([redacted] testimony). For example, a conservator is likely to know how functional an applicant is with regard to budgeting and other financial matters. *Id.*

15. On December 16, 2010 the Claimant signed a DSDS “Consent for Release of Records” form as part of her application for Waiver services (Ex. F-5). The Claimant listed [redacted], [redacted], and [redacted] as the three persons she wished DSDS to interview as part of the ICAP application process. *Id.*

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[3] On January 17, 2011 the Claimant received a DSDS “Qualifying Diagnosis Certification” of mental retardation (Ex. F-4).

16. The DSDS ICAP assessor subsequently interviewed [redacted] and [redacted], each of whom had known the Claimant for most of her life ([redacted] testimony). The DSDS assessor felt that she received reliable responses from these two interviewees. *Id.*

17. On April 21, 2011 the DSDS assessor contacted [redacted] of OPA/PGS, the third of the interviewees listed by the Claimant, to schedule his interview (Ex. I-2). Mr. [redacted] responded later that day that he was willing to be interviewed, but that he no longer worked with the Claimant on a regular basis (Ex. I-2). He recommended that DSDS interview [redacted] (also of OPA/PGS) instead, because Mr. [redacted] was currently in contact with the Claimant on a regular basis (Ex. I-2).

18. The DSDS assessor subsequently scheduled an interview with Mr. [redacted] and interviewed him during the period April 21 – 26, 2011 (Ex. I-1). She felt that she obtained reliable information from Mr. [redacted] ([redacted] testimony).

19. On April 26, 2011 DSDS completed its ICAP evaluation of the Claimant's level-of-care requirements and generated a three-page computer summary of the results (Exs. E-3, E-4, E-5). The Claimant obtained an ICAP service score of "96, level 9", indicating a need for "infrequent or no assistance for independent living" (Ex. E-5). Most significantly, the Claimant registered a Broad Independence Score on the ICAP of 537 (Ex. E-5).

20. According to the "Table of ICAP Broad Independence Scores by Age," adopted by DSDS on April 5, 2004 (Ex. G-4), the cut-off score for a person aged 18 years, zero months and older is 514. In other words, 514 is the maximum score that a person aged 18 or older can score on the Broad Independence test and still meet the Level of Care required to participate in the MRDD Waiver program.

21. On April 26, 2011 DSDS determined, based on the above, that the Claimant did not meet the Level of Care (LOC) requirements for the Mentally Retarded / Developmentally Disabled ("MRDD") Waiver Program (Exs. E-1, E-2). On that date, the Division mailed a notice to the Claimant stating that her application had been denied (specifically, that she was not eligible for the MRDD Waiver Program because she did not meet Level of Care requirements) (Exs. D-1, D-2). The Division's notice stated in relevant part as follows (Ex. D-1):

> Documentation received indicates that you experience a diagnosis of Mild Mental Retardation. An individual seeking an Intermediate Care Facility for the Mentally Retarded (ICF/MR) Level of Care determination, with a chronological age of forty-two years, [redacted] months, must have a broad independence domain score on the ICAP equal to or less than 514. Your broad independence domain score was 537, therefore, you are not eligible for the MRDD Medicaid Home and Community Based Waiver.

22. At the hearing of June 28, 2011 the Claimant testified in relevant part as follows:

a. She may look like she does not have a disability, but she does have a disability.

b. She does not remember things "half the time." She locks her keys in her car "half the time." She does not remember the ICAP process that she went through.

c. She had a sheltered childhood; her parents did everything for her.

d. She believes that it was a conflict of interest for Ms. [redacted] to assess her because Ms. [redacted] has known her for a significant period of time.

23. At the hearing of June 28, 2011 the Claimant's Representative, Ms. [redacted], testified in relevant part as follows:

a. Mr. [redacted] knows the Claimant only on a financial basis. The Claimant's main complaint is that DSDS interviewed Mr. [redacted] as part of the ICAP assessment, when the Claimant did not ask or authorize DSDS to interview Mr. [redacted].

b. In other words, the Claimant asserts that she has the right to control who DSDS interviews as part of her assessment; i.e. that DSDS cannot interview persons without her consent.

24. At the hearing of June 28, 2011 the Claimant's Care Coordinator, Mr. [redacted], credibly testified in relevant part as follows:

a. He and the Claimant completed the Claimant's ICAP application in December 2010. At that time, [redacted] was a proper person to be interviewed. However, the interviews did not actually take place until April 2011. He believes that DSDS should have re-contacted the Claimant in April 2011 and inquired as to whether the Claimant still felt that the interviewers previously listed were still current/appropriate.

b. He was the individual that actually submitted the Claimant's ICAP package. He did not request any change in interviewees. He did not know whether that was allowed.

25. At the hearing of June 28, 2011 DSDS assessor [redacted] credibly testified in relevant part as follows:

a. She is a Health Program Manager II for DSDS. She has worked for DSDS and/or its contractors for approximately 18 years. She has been the ICAP Assessor since the program began approximately ten (10) years ago. She conducts ICAP assessments herself, and also trains all incoming/new ICAP assessors.

b. She performed the ICAP assessment at issue on the Claimant. This is the first ICAP assessment that she performed on the Claimant.

c. She knew of the Claimant prior to the ICAP assessment at issue here. However, all of her knowledge of the Claimant was obtained in her professional capacity (i.e. in administering the Medicaid Program). She is not a familial relation or friend of the Claimant, and has never had any personal relationship with the Claimant. She does not believe she has ever met the Claimant.

d. If an assessor receives an application, and believes he or she has a conflict of interest as to that applicant, the assessor puts that application back and it is processed by a different assessor.

e. It is not unusual for an assessor to have prior *professional* knowledge of an applicant or recipient because applicants apply for different programs over the years, and because recipients have to be re-assessed periodically for continuing eligibility. Accordingly, she does not believe she has any conflict of interest in this case.

f. When applications for services are received by DSDS, they are routed to one assessor, who makes sure that all the documentation is in order. Once an application has been reviewed and been determined to be complete, the application is filed as ready for review and segregated according to the geographic area from which it was received.

g. Then, when an assessor is ready for more work, the assessor takes another application from the stack of pending applications, and proceeds with the ICAP assessment process.

h. At the time Mr. [redacted] was interviewed, DSDS had no knowledge that the Claimant did not want Mr. [redacted] to be one of the three interviewees. She was never contacted by the Claimant or her representative about substituting new/different interviewees.

i. After she scored the Claimant's ICAP, her score sheet was peer-reviewed by another DSDS assessor to ensure consistency. This was per DSDS' standard operating procedure.

j. Once the peer-review of the Claimant's ICAP score was completed, that information was routed on to Ms. [redacted]. Ms. [redacted] then made the eligibility determination by applying the governing regulations and policies to the facts as found by Ms. [redacted].

k. She believes that the Claimant's score of 537 is the highest score that an MRDD applicant has ever registered since she has been the DSDS ICAP Assessor. It is "far and away" higher than the maximum qualifying score for the Claimant's age group.

26. At the hearing of June 28, 2011 [redacted], a Health Program Manager I with DSDS, credibly testified in relevant part as follows:

a. She issued the level-of-care denial letter in this case.

b. The Claimant is over the age of 18. For a person over the age of 18, the maximum qualifying ICAP "Broad Independence Domain Score" score is 514 (*see also* Ex. G-4). The Claimant's ICAP "Broad Independence Domain Score" was 537, which is significantly above the maximum qualifying score.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's denial of the Claimant's initial application for Waiver services; the case does not involve the suspension, reduction, or termination of any previously existing Medicaid benefits. The party seeking a change in the status quo or existing state of affairs normally bears the

burden of proof. [4] Because the Claimant seeks to change the status quo by obtaining benefits, the Claimant bears the burden of proof in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case. [5] 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. [6]

II. The Medicaid Program – In General.

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

On the federal level, the Secretary of the U.S. Department of Health and Human Services ("HHS") administers the program through the Centers for Medicare & Medicaid Services ("CMMS"), formerly known as the Health Care Financing Administration ("HCFA"). In Alaska, the Department of Health and Social Services administers the Medicaid program on the state level.

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

The State of Alaska's statutes implementing the federal Medicaid program are set forth at A.S. 47.07.010 – A.S.47.07.900. The State of Alaska's regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapters 43 and Chapters 100 – 160.

III. The Medicaid Home and Community-Based Waiver Services Program.

Medicaid Home and Community-Based Waiver Services Programs (also known as "Waiver Programs") allow people, who would otherwise need an institutional level of care, to continue to live in their home or community and receive the care they need without being institutionalized. *See* DSDS website at http://www.hss.state.ak.us/dsds/grantservices/hcbwaivers.htm (date accessed August 21, 2011). Waiver programs are approved by the federal government and allow Alaska to provide expanded services to people who meet the eligibility criteria for the specific waiver program. *Id.* The Mentally Retarded / Developmentally Disabled ("MRDD") waiver program is one of four waiver programs currently available in Alaska. *Id.*

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

[5] 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).

[6] *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").

IV. The Waiver Program For The Mentally Retarded / Developmentally Disabled.

This case involves the Waiver Program for the Mentally Retarded / Developmentally Disabled ("MRDD)." The regulations for administration of the MRDD Waiver Program are located at 7 AAC 130.200 – 7 AAC 130.319. The purpose of 7 AAC 130.200 - 7 AAC 319, as stated in 7 AAC 130.200, 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."

7 AAC 130.205 applies to the MRDD Waiver Program and provides in relevant part as follows:

> (d) For the department to determine an applicant eligible to receive home and community-based waiver services under this section, the applicant must (1) fall into one of the following recipient categories . . . . (C) individuals with mental retardation and developmental disabilities . . . . and (2) require a level of care provided in a nursing facility or ICF/MR; the department will base a determination of eligibility under this paragraph on the level-of-care assessment under 7 AAC 130.230(b), and will determine eligibility under . . . . (B) 7 AAC 140.600, if the applicant falls within the recipient category of individuals with mental retardation and developmental disabilities . . . .

7 AAC 130.230, titled "Screening, Assessment, Plan of Care, and Level-of-Care Determination," provides in relevant part as follows:

> (b) . . . . If the assessment is to determine if the applicant falls within the recipient category for (1) individuals with mental retardation and developmental disabilities, the (A) department will make a level-of-care determination under 7 AAC 140.600(c) - (d); and (B) level-of-care determination must incorporate the results of the *Inventory for Client and Agency Planning (ICAP)*, adopted by reference in 7 AAC 160.900, that is administered under 7 AAC 140.600(c) - (d); or . . . .

7 AAC 140.600, titled "ICF/MR Enrollment and Conditions for Payment," provides in relevant part:

> (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 conditions:
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>> (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;
>
> . . . .

> (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.

7 AAC 160.900, titled "Requirements Adopted by Reference," provides in relevant part as follows:

> (a) The following documents referenced in 7 AAC 105 - 7 AAC 160 are adopted by reference . . . . (12) *Inventory for Client and Agency Planning* (ICAP), as revised as of 1986 . . . .
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> . . . .
>
> (d) The following department documents are adopted by reference . . . . (5) the *Table of ICAP Broad Independence Scores by Age*, revised as of April 5, 2004 . . . .

According to the "Table of ICAP Broad Independence Scores by Age," adopted by DSDS on April 5, 2004 (Ex. G-4), the cut-off score for a person aged 18 years, zero months and older is 514. In other words, 514 is the maximum score that a person aged 18 or older can score on the Broad Independence test and still meet the Level of Care required to participate in the MRDD Waiver program.

The DSDS Policy and Procedure Manual, "Guidelines for the ICAP Process," states at page 2 (Ex. J-2) in relevant part as follows:

> D. The care coordinator is responsible for: (1) Notifying selected applicants and current recipients about the ICAP process and of the need for documentation to support an ICF/MR level of care determination; (2) Collecting supportive diagnostic documentation . . . . (3) Submitting the documentation to SDS within 60 days of written notification of a new waiver selection or of a waiver renewal . . . . (4) Identifying respondents who are knowledgeable, willing, and available to be interviewed about the applicant/recipient's <u>current</u> skills and behaviors; (5) Providing the names and contact information of the identified respondents to SDS; (6) Informing the identified respondents about the ICAP process . . . . .

The DSDS Policy and Procedure Manual, "Guidelines for the ICAP Process," states at page 5 (Ex. J-5) in relevant part as follows:

> 3. The care coordinator must provide the names of three respondents who are familiar and knowledgeable about the applicant/recipient, and who are willing and available to be interviewed by the SDS assessor; daytime telephone number(s); and an explanation of the relationship of each to the applicant/recipient.
>
> > a. A respondent is an individual who sees the applicant/recipient daily, has known him/her for at least three months, and, consequently, has knowledge of his/her <u>current</u> skills and behaviors . . . .

. . . .

> d. SDS reserves the right to require additional or different respondents to ensure a complete, accurate, and quality assessment.

ANALYSIS

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

The Division's denial notice dated April 26, 2011 (Exs. D-1, D-2) stated in relevant part as follows:

> Documentation received indicates that you experience a diagnosis of Mild Mental Retardation. An individual seeking an Intermediate Care Facility for the Mentally Retarded (ICF/MR) Level of Care determination, with a chronological age of forty-two years, two months, must have a broad independence domain score on the ICAP equal to or less than 514. Your broad independence domain score was 537, therefore, you are not eligible for the MRDD Medicaid Home and Community Based Waiver.

The Division's sole basis for its denial of the Claimant's Waiver application, as stated in its notice, is that the Claimant's Broad Independence Domain Score on the ICAP (537) is higher than the maximum qualifying score (514). Accordingly, the sole issue in this case is whether the Division correctly followed the applicable regulations and policy provisions in its administration of the ICAP.

Because the Claimant is applying for benefits, the Claimant bears the burden of proving, by a preponderance of the evidence, that the Division's administration of the ICAP in this case violated the Division's applicable regulations and policy provisions. *See* Principles of Law at pages 7-8, above.

II. Did the Division Administer the ICAP in Accordance With Applicable Regulations and Policies?

The regulations and policy manual provisions relevant to qualification for the MRDD Waiver Program which the Claimant challenges in this case are not complex. Initially, 7 AAC 130.205(d)(1) requires that applicants fall into one of four categories; one of these categories is category C - individuals with mental retardation and/or developmental disabilities. These individuals qualify for the waiver if they "require a level of care provided in a nursing facility or ICF/MR." *See* 7 AAC 130.205(d)(2).

The issue raised in this case relates to *how* the Division determined whether the Claimant "requires a level of care provided in a nursing facility or ICF/MR." Pursuant to 7 AAC 130.205(d)(2), in determining eligibility for individuals with mental retardation and/or developmental disabilities, DSDS is required to base its determination of eligibility "on the level-of-care assessment under 7 AAC 130.230(b)," and is also to "determine eligibility under . . . . 7 AAC 140.600."

Pursuant to the first of these two regulations, 7 AAC 130.230(b), the Division's level-of-care determination for individuals with mental retardation and developmental disabilities "must incorporate the results of the *Inventory for Client and Agency Planning (ICAP)*, adopted by reference in 7 AAC 160.900."

Pursuant to the second of these two regulations, 7 AAC 140.600(d), applicants with mental retardation and developmental disabilities must demonstrate, among other things, that their condition constitutes

"a substantial disability to the individual's ability to function in society, as . . . measured by the *Inventory for Client and Agency Planning (ICAP)* . . . and . . . [as] 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."*

There is no dispute that the Claimant is over 18 years of age. There is also no dispute that, according to the "Table of ICAP Broad Independence Scores by Age," adopted by DSDS on April 5, 2004 (Ex. G-4), the cut-off score for a person aged 18 years, zero months and older is 514. In other words, 514 is the maximum score that a person aged 18 or older, such as the Claimant, can score on the Broad Independence test and still meet the Level of Care required to participate in the MRDD Waiver program. Finally, there is no dispute that the Claimant's Broad Independence Domain score was 537, 23 points above the cut-off score. Accordingly, pursuant to the applicable regulations, and pursuant to the *Inventory for Client and Agency Planning (ICAP)* and the *Table of ICAP Scores by Age*, (each of which are adopted by regulation), the Claimant did not prove that she requires a level of care provided in a nursing facility or ICF/MR.

The Claimant asserts that the Division's administration of the ICAP was flawed in her case because the Division interviewed one person who she did not specify (Mr.) in place of one person that she did specify (Mr.). However, pursuant to the DSDS Policy and Procedure Manual, "Guidelines for the ICAP Process" at page 5, para. 3 (Ex. J-5), DSDS is to interview persons who have knowledge of an applicant's "current skills and behaviors" (emphasis in original). It was undisputed that Mr. 's knowledge of the Claimant is more current than Mr. 's knowledge of the Claimant. Further, pursuant to the DSDS Policy and Procedure Manual, "Guidelines for the ICAP Process" at page 5, para. 3(d) (Ex. J-5), DSDS specifically "reserves the right to require additional or different respondents to ensure a complete, accurate, and quality assessment." Accordingly, DSDS had the right to, (and was arguably *required* to), substitute Mr. for Mr. as an interviewee in this case.

Also, even assuming for the sake of argument that it was somehow improper for DSDS to substitute Mr. for Mr. as an interviewee, the Claimant has the burden of proving that interviewing Mr. instead of Mr. adversely affected her ICAP score. The Claimant made no such showing.

The Claimant also asserts that the Division's administration of the ICAP was flawed in her case because the Division's ICAP assessor had previously dealt with the Claimant in her professional capacity. However, the Claimant failed to demonstrate that this violated any Division regulation or policy. Likewise, the Claimant failed to demonstrate any actual bias or conflict of interest on the part of the ICAP assessor who scored her.

III. Summary.

In summary, the Claimant had the burden of proof in this case. However, she did not establish either that the Division failed to follow any applicable regulation or policies, or that her ICAP assessment or score was incorrect. The Claimant did not have a Broad Independence Domain Score on the ICAP of 514 or less. In addition, the Claimant received an ICAP service score of 96, level 9, indicating a need for infrequent or no assistance for independent living. Accordingly, the Claimant failed to prove, by a preponderance of the evidence, that she required the level of care provided in a nursing facility or Intermediate Care Facility for the Mentally Retarded (ICF/MR) at the time of her assessment.

The Division has the discretion, under its regulations and policies, to substitute an ICAP interviewee of its choosing for an ICAP interviewee of the applicant's choosing in certain circumstances. The Division's interviewing of Mr. [redacted] in place of Mr. [redacted] was appropriate based on the particular facts of this case.

Finally, the performance of an ICAP assessment by an assessor who has previously dealt with an applicant in a purely professional capacity does not present a conflict of interest or otherwise invalidate the assessment.

The Division was therefore correct when, on April 26, 2011, it denied the Claimant's application for participation in the Medicaid Home and Community-Based Waiver Services Program.

CONCLUSIONS OF LAW

1. The Division properly conducted its Mentally Retarded / Developmentally Disabled (MRDD) Waiver Program level-of-care determination in this case pursuant to regulations 7 AAC 130.230(b) and 7 AAC 140.600(d).

2. The Division properly incorporated the results of the *Inventory for Client and Agency Planning* (ICAP) into its MRDD level-of-care determination.

3. Because the Claimant did not have a Broad Independence Domain Score of 514 or less on the *Inventory for Client and Agency Planning* (ICAP), she did not meet the Level of Care required for participation in the MRDD Waiver Program.

4. The Claimant failed to carry her burden and did not prove, by a preponderance of the evidence:

   a. That the Division failed to follow any applicable regulation or policy, or that her *Inventory for Client and Agency Planning* (ICAP) assessment or score was incorrect; or that she required the level of care provided in a nursing facility or Intermediate Care Facility for the Mentally Retarded (ICF/MR) at the time of her assessment.

   b. That the Division's administration of the *Inventory for Client and Agency Planning* (ICAP) was in any way flawed because the Division interviewed one person whom the Claimant did not specify in place of one of the three persons whom the Claimant did specify.

   c. That the Division's administration of the ICAP was in any way flawed because the Division's ICAP assessor had previously dealt with the Claimant in a professional capacity.

DECISION

The Division was correct when, on April 26, 2011, it denied the Claimant's application for Medicaid Home and Community-Based Waiver Services, because, as of the date of her assessment, the Claimant did not have a Broad Independence Domain Score on the *Inventory for Client and Agency Planning* of 514 or less, and therefore did not meet the ICF/MR level of care required for participation in the Mentally Retarded / Developmentally Disabled (MRDD) Waiver Program.

APPEAL RIGHTS

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

Director, Division of Senior and Disabilities Services
State of Alaska Department of Health and Social Services
550 West 8th Avenue
Anchorage, Alaska 99501

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 23rd day of August, 2011.

______*/signed/*______________________
Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on August 23, 2011 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. Mail, and to the remainder of the service list by secure e-mail, as follows:

Claimant - via Certified Mail, Return Receipt Requested
Claimant - via First Class Mail

[redacted], DHCS / DSDS Hearing Representative

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

By:______*/signed/*________________________
J. Albert Levitre, Jr.
Law Office Assistant I