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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-2460
)
)
 Claimant.) Division Case No. [REDACTED]

FAIR HEARING DECISION

STATEMENT OF THE CASE

Ms. [REDACTED] (Claimant) was receiving Medicaid benefits under the Home and Community-Based Waiver (HCBW) Mentally Retarded and Developmentally Disabled program (now called Intellectual and Developmental Disabilities, (IDD)). (Ex. A, pp. 1-2) Claimant submitted a proposed amendment to her existing plan of care, received by the Division of Senior and Disabilities Services (Division) on November 17, 2011. (Ex. A, p. 2) Included in Claimant's proposed amendment was a request that Medicaid pay for changes to the garage of a home so that Claimant could live there. (Ex. A, p. 2) On November 23, 2011, the Division of Senior and Disabilities Services (SDS) notified Claimant it had denied her request. (Ex. D)

On December 2, 2011, Claimant requested a Fair Hearing. (Ex. C) This office has jurisdiction pursuant to 42 C.F.R. § 431.200-431.250 and 7 AAC 49.010-.020.¹

A Fair Hearing was held January 18, 2012. Claimant was represented, for purposes of the hearing only, by the Choate Law Firm by and through Mr. Mark Choate, Esq. who participated by telephone. Claimant was assisted by her mother and legal guardian, Mrs. [REDACTED], who participated by telephone and testified on behalf of Claimant. The Alaska Division of Senior and Disabilities Services (Division) was represented by Ms. Kimberly Allen, Assistant Attorney General, Department of Law, who participated in person. Ms. [REDACTED], Health Program Manager for Senior and Disabilities Services (Division Reviewer) participated by telephone and testified on behalf of the Division.

¹ Alaska regulation 7 AAC 49.020(4) provides a Fair Hearing to individuals whose "request for a covered Medicaid service has been denied."

The evidentiary record was closed at the end of the hearing on January 18, 2012. The parties were provided until February 1, 2012 to file a closing brief. A closing brief was received from only the Division on February 1, 2012.

ISSUE

On November 23, 2011, was the Division of Senior and Disabilities Services correct to deny Claimant's request to amend her Plan of Care to add Medicaid payment for environmental modification services for the purpose of converting a garage into a bedroom for Claimant?

SUMMARY OF DECISION

The Division was correct to deny Claimant's request to amend her Plan of Care to obtain environmental modification services for the purpose of converting the garage at her sister's home to a bedroom. The Division was correct because Claimant requested services for which the Department of Health and Social Services will not pay. 7 AAC 130.300.

FINDINGS OF FACT

The following facts have been proved by a preponderance of the evidence and support the decision.

A. Claimant's Circumstances

1. Claimant is an adult, single woman who lives with her mother, and whose father and two sisters live in the same town. (Ex. E, pp. 2, 8) The entire family is involved in supporting Claimant. (Mother's testimony; Ex. E, pp. 4, 7, 9) Both of Claimant's sisters are care providers for Claimant. (Ex. E, p. 8) One sister, ██████████, is paid through ██████████, Inc. ██████████) to provide care services. (Mother's testimony)

2. Claimant's primary diagnosis is "seizure disorder (Uncontrolled)" and secondary diagnoses are: "Batton syndrome, mental retardation, impaired skin integrity, dysphasia, immune deficiency and impaired mobility." (Ex. E, p. 5) It is undisputed that Claimant needs substantial care 24 hours a day, 7 days a week. (See, Ex. E, pp. 5-6, 9-14; parties' testimony) Claimant's primary physician believes her condition will continue to regress and that she is terminally ill. (Ex. E, p. 10)

3. Claimant is "completely technology dependent." (Mother's testimony) Claimant requires substantial adaptive equipment including: "a stroller, specialized swing, gait belt, ankle-foot orthotics, ramp, bedroom gates, pulse oximeter, strider, car scope, stethoscope, adult jogger, safari tilt and recline mobility system and a helmet, Physioball and portable 4' ramp ... Portable Suction machine, portable O2, Envision pressure mattress, IV set up system, emergency phones, sharps containers." (Ex. E, p. 8) One machine requires 220 volt electrical current. (Mother's testimony) All of Claimant's equipment and her hospital bed is at her mother's home, except her portable equipment, which travels with Claimant. (Mother's testimony)

4. Claimant doesn't always require use of all of her equipment. Usage varies with her needs and her changing health condition. For example, sometimes she sleeps in a regular twin bed and sometimes she sleeps in a hospital bed at her mother's house. (Mother's testimony)

5. Claimant's home is with her mother at [REDACTED] Street [REDACTED], Alaska, as listed on the approved Plan of Care (mother's home). (Ex. E, pp. 2, 4, 8; Ex. F, p. 21)

6. It is undisputed that Claimant receives Medicaid benefits as a recipient of services through the Intellectual and Developmental Disabilities program (IDD)² of the Home and Community Based Services Waiver program (HCBW). (Ex. A, p. 1)

B. Claimant's Caregivers and Care Locations

7. Claimant's care is coordinated through the [REDACTED] agency. (Ex. 4) Claimant's sister, [REDACTED], is employed by [REDACTED] to provide care for Claimant. (Mother's testimony)

8. Claimant's mother provides "natural supports," including providing Claimant's residence at a portion of her mother's [REDACTED] Street home (Mother's house).³ (Ex. E, pp. 4, 10; Mother's testimony)

9. Claimant's mother's testimony provided the following facts:

Mother's House

a. Claimant's home with her mother at [REDACTED] Street can be up to 15 minutes drive from the hospital or from the base for emergency medical technicians (EMTs) that is at the airport. Access to the residence requires ascending a steep hill. This slows access by EMTs who are called when Claimant is having a medical emergency. When Claimant needs medical assistance, she needs immediate attention. Claimant is susceptible to acquiring illnesses from hospital stays and therefore her medical needs are addressed other than at a hospital as much as possible.

b. The house was built fifteen years ago with providing housing and care for Claimant in mind. It is constructed on pilings. It is shaped like two adjacent rectangles that connect through the living room. One rectangle consists of Claimant's residential area, which includes her bedroom and her living room, which opens into the living room area of her mother's rectangular part of the house. In the mother's portion of the house, in addition to the common/adjoining living room, there is a dining room, kitchen, bathroom, and three bedrooms upstairs. Claimant's 24 hour care provider(s) stay at this house when Claimant is there.

² This IDD program formerly was called the Mental Retardation/Developmental Disabilities [MRDD] program).

³ Claimant receives care from her mother and from her sister at both of their houses.

c. The EMTs have difficulty getting a stretcher from the living room into Claimant's bedroom, which makes transport difficult or not possible, so a two person carry is required to move Claimant.

d. Claimant's area is filled with her equipment and supplies and is crowded. The house is too small to contain the amount of equipment Claimant now needs, for example a hospital bed which is "taken down" when she is not using it. Claimant's equipment has "taken over the small amount of living space she has in [Claimant's mother's] home."

e. Claimant's mother believes she cannot make any structural changes to the house to accommodate Claimant's needs because her house is built on pilings. Claimant's mother would not live elsewhere to care for Claimant because she lives in a "really nice home" that she maintains for her three daughters (which includes Claimant) and two grandchildren, and she is not prepared to move.

f. Claimant's mother is concerned that Claimant's health, safety and welfare, and ability to stay out of the hospital, requires that Claimant have more ready and convenient access to her medical support systems and emergency medical care than can be obtained at her home.

Claimant's Sister's house

g. Claimant receives care from her sister, [REDACTED], at the [REDACTED] Street house (sister's house).⁴ The sister's house is about 3 minutes from the airport EMT service base and is right on the [REDACTED] Highway. This house is one level at grade, has three bedrooms, a living room-dining area and a door from that area into the garage. (*See also* Exhibit F, p. 14; Ex. 13, p. 2) Claimant gets in and out of the residence through the front door, either by walking with assistance or with a two person carry-assist.

h. Claimant's sister's [REDACTED] house at [REDACTED] Street is owned by a third person but [REDACTED]'s family is in the process of buying it.

i. The sister's house is occupied by [REDACTED], her husband and two daughters.

j. [REDACTED] provides the majority of Claimant's care, both natural and paid. The week before the hearing, Claimant spent about 60 or 70 hours at her sister's house, including spending the nights there. When Claimant's health permits, between 7-8 a.m. Claimant is taken to her mother's house by her care providers, spends the day there, and then is returned to her sister's house for dinner, overnight and breakfast.

k. When Claimant sleeps at her sister's house she stays in one of the bedrooms in a regular twin bed, which otherwise is occupied by one of [REDACTED]'s

⁴ See footnote 3.

daughters. The daughter vacates her bedroom and stays with [REDACTED]'s other daughter.

l. Claimant's hospital bed is not at her sister's house because there is no space for it. When Claimant's needs to stay in a hospital bed, she stays at her mother's house. At her sister's house, Claimant's medications must be stored in several locations.

m. The garage at her sister's house is now filled with boxes and is used for storage space, not a car. If Claimant lived in the garage, it would be large enough to store all that is necessary for her medical support.

C. Medicaid Home and Community-Based Services (HCBW or Waiver) – Claimant's Plan of Care

10. Claimant's Home and Community Based Medicaid Waiver (HCBW) Plan of Care (POC) was approved on September 29, 2011 with a start date of August 24, 2011 and end date of August 11, 2012. (Ex. E, pp. 1-2)

11. Claimant's Plan of Care included a section addressing needed environmental modifications. (Ex. E, pp. 8, 15) Claimant's Plan of Care identified "environmental modifications needed, pending future request" as:

Due to [Claimant's] progressive seizure activity and her need for 24 hour awake two on one support when medically necessary; she requires a room that is designed to meet her medical care needs. As such her sister has purchased a home that will be considered her primary residence at night and on those days when ambulation and/or transfers cannot occur. This environment (sic) will not increase the square footage of the home but will convert the existing garage into an accessible room set up to meet [Claimant's] medical care needs. She requires that a suction machine, O2, soft surfaces with rounded corners, built in supply cabinets to ensure that they remain sterile and that they are readily available to meet her emergency care needs outside of a hospital setting. ... As such, [Claimant] requires two homes to meet her ever changing care needs. (Ex. E, pp. 8, 15)

D. HCBW Request to Amend Claimant's Plan of Care (amendment request)

12. On November 17, 2011, the Division received a request from Claimant to amend her Plan of Care (amendment request). (Ex. F, p. 1) The amendment request was signed by Claimant's mother on November 13, 2011. (Ex. F, p. 9) The amendment request consists of substantially the same wording as was used to describe the reason for and extent of the environmental modification described in Claimant's Plan of Care. (See Ex. E, pp. 8, 15 compared with Ex. F, p. 2)

13. Claimant supplied a letter from Dr. [REDACTED], M.D., dated November 15, 2011, stating that "[a] modification to her primary residence will ensure her health, welfare and overall safety

within a fully accessible environment that can support her medical equipment, supplies and care needs.” (Ex. F, p. 11)

14. The request for environmental modification states, in relevant part:

[Claimant] requires a room that is designed to meet her medical care needs. As such, her sister has purchased a home that will be considered her primary residence at night and on those days when ambulation and/or transfers cannot occur. This environmental modification will not increase the square footage of the home but will convert the existing garage into an accessible room set up to meet [Claimant’s] medical care need. (as noted by CBJ assessment of property) She requires that a suction machine, O2, soft surfaces with rounded corners, built in supply cabinets to ensure that they remain sterile and that they are readily available to meet her emergency care needs outside of a hospital setting.” Due to [Claimant’s] progression of her disease, it is her team’s desire to remain outside of hospital settings as much as possible and to manage her care with the assistance of a vendor qualified to provide skilled nursing within an environment set up to model a hospital setting within a home environment with her family and friends assisting in her care. While [Claimant’s] mother’s home is accessible it does not have an accessible bathroom or entry when [Claimant] is non-ambulatory nor does it have space to support all of the additional medical supplies she now requires (hospital bed, pumps, IV set up, O2, and room for staff). This environmental modification is within the scope and the intent of 7 AAC 130.300(2)(b) and does not add additional square footage to the home. (Ex. F, pp. 2, 3)

15. Claimant supplied a completed “Request for Cost Estimate” for a “room modification” estimating the total cost of converting the garage to be \$9,968.00. (Ex. F, p. 12) The Request was completed by ██████████ Construction, dated October 26, 2011 and accompanied by a diagram, materials list, and description of the labor to be performed. (Ex. F, pp. 13-16)

a. The diagram of the “room modification” describes the outside dimension of the garage as “20 feet by 14 feet”, addition of two “French doors” 6 by 6 feet, installation of electrical outlets in five locations, and the words “sheetrock tape, texture, permit to (illegible), carpet floor, install outlets, furnace recessed rocked (illegible)” along the 14 foot side opposite the garage door. (Ex. F, p. 14)

b. The materials list includes: 8 sheets of 2 inch rigid foam (252 square feet), 8 sheets of tongue and grooved plywood (252 square feet), 3 sheets CDX plywood, two French doors, Fiberglass insulation, 30 square yards of carpet and of carpet padding, two rolls of 30 pound roofing felt (tar paper), 14 pieces of 5 inch channel siding, 50 four inch lag bolts and washers, 24 eight inch “red heads” (bolts for concrete), 90 square feet of Tyvek (impermeable, water resistant house wrap), 3 sheets of sheetrock, two boxes of sheetrock “mud,” paint, and miscellaneous electric and other materials (Ex. F, p. 15)

16. Claimant also provided a completed form “Property Owner’s Consent to Environmental Modification” signed by [REDACTED] as property owner on September 16, 2011. (Ex. F, p. 18)

17. Claimant supplied three pages of descriptive information concerning her sister’s house.⁵ (Ex. 13)⁶ The garage is shown as attached to the house and 250 square feet. (Ex. 13, p. 1) The “as built” improvements sketch shows the garage to be twelve and one-half (12.5) feet by twenty (20) feet totaling 250 square feet. (Ex. 13, p. 2)

18. Claimant’s mother’s testimony provided the following facts:

a. Claimant’s mother desires to convert the garage at the sister’s house into a “like hospital room” bedroom for Claimant. This would change the nature of the room and would change the residential square footage area of the sister’s house as it is described on Exhibit 13 page 2, ([REDACTED] report, Sketch/Area Table Addendum showing liveable area as 1068 square feet and garage separately as 250 square feet).

b. The garage has a hand-operated garage door and only light available. The electricity needs to be upgraded because a piece of Claimant’s equipment needs more power than the regular electric outlets provide.

c. If the garage were converted, all of Claimant’s equipment and supplies could be left there. Converting the garage would provide two French doors for access by the EMTs, one of which would lead from the dining/living rooms to the garage. It would also require putting in a sub floor, carpeting, walls, insulation, and sheet rock. If Claimant lived in the converted garage she would be closer to the refrigerator and might be observed from the dining/living area of the house.

d. Claimant’s mother could not explain why the hand-drawn contractor’s diagram (Exhibit F, p. 14) shows the garage as 14 feet wide but the [REDACTED] report, (Exhibit 13, p. 2), shows the garage as 12.5 feet wide.

e. Presently, there is a step up/down between the garage floor and the floor level of the residential part of house. The floor level variation is not shown in the contractor’s diagram (Exhibit F, p. 14).

f. The contractor’s diagram (Exhibit F, p. 14) shows a proposed wall between the proposed bedroom area and the furnace and hot water heater. Claimant’s mother will pay for construction of this proposed wall, which will

⁵ The document source is unclear. The first page is titled “Itemized Property Costs – based on [REDACTED]” and is undated. The first page states the house was built in 1973 and its “effective age” is shown as 15 years. This would make the document reflective of information as of 1988. See Exhibit 13, p. 1.

⁶ Claimant’s exhibits were identified by alphabetical letter, as were those of the Division. During the hearing, it became evident that several of Claimant’s exhibits were identical to those of the Division. For administrative convenience, Claimant’s exhibits were re-marked with numerical identifies.

block off a window, and possibly a back door in the garage, from the proposed bedroom. Claimant's mother also intends to pay for construction of changes to the hot water system, as the hot water heater exhaust would be re-ducted and vented outside of the garage.

19. The testimony of Ms. [REDACTED],⁷ the Division Reviewer, established the following facts:

a. She is one of the two persons who primarily reviewed Claimant's amendment request for environmental modification services. She wrote the denial letter sent on November 23, 2011. (Exhibit D)

b. She based her denial on a belief that the amendment request was for an increase in the residential area of the house and a renovation of the house. She was unclear whether Claimant's needs could be addressed by other practical modifications. She did not deny the amendment request because it applied to Claimant's sister's home. She denied it because the request was to create a new space for Claimant to live in, instead of modifying her present, existing, living environment.

c. She was led to believe this, substantially, by the large scope of the work requested and the nature of the components included in the work proposed to be done to the garage. This included work such as taking out garage doors, putting in sheet rock, insulating un-insulated space, putting in electrical materials and installing other utilities (which are not allowable, like carpeting and flooring). Claimant's intent to create a space that models a hospital room out of a garage seemed excessive and beyond the scope of the environmental modifications allowed by the regulation.

d. She reviewed Dr. [REDACTED]'s letter and concluded that he is in support of environmental modification to Claimant's primary residence but not to the specific amendment requested.

e. She did not have any opportunity to review a property assessment before writing the denial letter, even though her amendment request referenced ("as noted by CBJ assessment of property") because the assessment was not submitted. She reviewed all the information provided which is the information reproduced as Exhibit F, pp. 13-16. After writing the denial letter, and for purposes of the hearing, Claimant supplied Exhibit 13, which appears to be a property assessment from Marshall and Swift.

⁷ Ms. [REDACTED] testified she is a Health Program manager who has worked for the Division for about 9 years and her job is to review Medicaid waiver eligibility for applicants for the IDD waiver, conduct case management, and provide technical support to care coordinators and agencies. Her educational background includes a degree in psychology and a Master's level degree in Northern Studies with an emphasis in health care issues in relation to social care issues, including issues related to Health and Fetal Alcohol Syndrome. She is a certified special education teacher and has worked in that capacity for ten years in rural areas in the Navajo Nation.

f. Exhibit 13, Claimant's property assessment of the sister's house, supports her denial because it is clear that renovating the garage to create a habitable space for Claimant would enlarge the residential area. On Exhibit 13, page 2, the calculation of the "net LIVABLE Area" is noted as "1068" square feet, which excludes the garage space, which supports her denial of her amendment request on grounds that it increase the liveable square footage of a home. She understood the use of the word "residential" in the regulation as meaning space that was used for living in and habitable for living in.

g. The denial letter states: "[a]lso, no pictures were provided with the request so the Division is unable to confirm whether other practical modifications exist that do not require renovation." She meant that given the information provided with the amendment request, there were no other modifications she could consider in relation to the amendment request.

h. Her understanding of the applicable regulation is that it does not allow people to upgrade or fix up houses but does allow for modifications to recipients' existing residences to decrease their risk of serious injury. The modifications are to be done to existing bedrooms or rooms where the recipient lives.

i. She researched as best she could the four letters supplied by Claimant as Exhibit 14 concerning environmental modifications made by other recipients of Medicaid benefits. All four concerned modifications approved before the change in the regulation which now applies to Claimant's amendment request. Also, in some of those four instances, other funding sources were involved in the modifications.

PROCEDURAL MATTERS

During the hearing, the following objections were raised and addressed.

1. Claimant's counsel objected to testimony concerning any basis for the Division's denial of her request other than those written in the denial letter. In particular, Claimant's counsel argued the Division could not introduce evidence concerning the fact that the premises for which modification is being sought are not the premises in which Claimant resides and could not introduce evidence concerning ownership of the sister's house. Claimant argued that fair hearing due process requirements limit the scope of a fair hearing to the grounds for denial found in the notice of denial and that the Division's letter and its testimony, made clear that it did not deny the request because the garage belonged to Claimant's sister.

In essence, Claimant asserted that the scope of the hearing must be limited to the base(s) on which the Division denied Claimant's request for environmental modification in its denial letter because otherwise Claimant would not be provided notice adequate to meet the requirements of procedural due process.

The remedy for inadequate notice is not to circumscribe, limit, or change the applicable law to meet the parameters of the Division's notice,⁸ but to give Claimant an opportunity to receive adequate notice.⁹ Nonetheless, the denial letter expressly states:

- a) This proposal is to create a new space for [Claimant] to live rather than to modify her current environment to meet her changing health needs.
- b) Your proposal is for her sister to purchase a home and convert the garage to a living space that will be considered [Claimant's] primary residence at night/or when transfers cannot occur. (Emphasis added)
- c) While [Claimant's] health needs may warrant some modifications to her existing environment, this request is to create a new living space for [Claimant] within a garage which is not within the scope of an environmental modification request. (Emphasis added)

(See Ex. D, p. 2)

Therefore, Claimant had notice that the question of where Claimant was deemed to reside was an issue of the case. The Division agreed it did not deny Claimant's request because of the status of ownership or title of her sister's home. Claimant's objection was overruled during the hearing and remains overruled.

2. The Division's counsel objected to admitting Claimant's Exhibits 1-5 on grounds they were irrelevant, not current, expired, or cumulative, and because both parties agreed Claimant was eligible for and receiving Home and Community Based Services Waiver benefits from Medicaid. Claimant's counsel asserted Claimant's Exhibits 1-5 were relevant because Claimant was entitled to "unique" consideration for benefits because she was a person "de-institutionalized under OBRA."¹⁰ The Division's objection was overruled, and the Exhibits were admitted, subject to the weight to which they were entitled.

⁸ Among the purposes of a fair hearing is to check that the Division has properly applied the law and regulations. 7 AAC 49.170 ("the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case...") This task protects public assistance recipients from improper or incorrect State action under the applicable law. Otherwise stated, the purpose of a fair hearing includes determining if the Division has erred in applying the regulations and laws when it took the action complained of and which the Fair Hearing addresses.

⁹ During the hearing, the Hearing Authority suggested to Claimant's counsel that if Claimant was raising an issue related to deficiency of notice, Claimant could be provided with additional time to prepare for the hearing. Claimant did not accept the invitation and therefore is understood to have declined the offer and hence waived the issue.

¹⁰ Claimant's argument appeared to be that because she availed herself of the HCBW program benefits when they became available, and thus was able to leave an institution and receive support services in her home, she, therefore, was automatically entitled to all benefits available under the HCBW program. She appeared to argue she was unique among HCBW recipients and was not required to show that she was eligible for the benefits she sought. She appeared to argue she was entitled to all benefits, irrespective of the requirements of the law in place at the time she requested the benefits. Claimant did not avail herself of the opportunity to support this argument either at the hearing or in post-hearing briefing.

PRINCIPLES OF LAW

The following legal authorities are applicable to this decision.

I. Burden of Proof and Standard of Proof

“Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). The standard of proof in an administrative proceeding is a “preponderance of the evidence,” unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Com’n*, 711 P.2d 1170, 1183 (Alaska 1986) “Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003) Claimant is seeking to change her Plan of Care by seeking a request to approve an amendment to it and therefore Claimant bears the burden of proof.

Recipients of Medicaid paid Home and Community Based Services Waiver program benefits are required to show they are eligible for the services they seek and have those services included in a Plan of Care. 7 AAC 130.205; 7 AAC 130.230. Medicaid payment for environmental modification services is limited to those services authorized as part of a recipient’s Plan of Care. 7 AAC 130.300(a). Therefore, for this reason also, Claimant bears the burden of proving she is eligible for the environmental modification services she seeks to be included in her Plan of Care.

II. Medicaid Paid by the State of Alaska

The State of Alaska provides medical assistance to needy persons who are eligible. AS 47.07.010; AS 47.07.020. It does this, in part, by participating in the national medical assistance program provided by 42 U.S.C. 1396 – 1396p, (Title XIX of the Social Security Act), which provides grants to states for medical assistance programs, including Medicaid. Alaska statute AS 47.07.45 provides home and community-based services under a waiver program in accordance with 42 U.S.C. 1396-1396p. Alaska Statute 47.07.036 authorizes the Department of Health and Social Services to implement cost containment measures in relation to Medicaid benefits.

Federal Medicaid regulations, relevant to this case, concerning home or community-based services are found at 42 C.F.R. § 440.180 and 42 C.F.R. § 441.300-310. Regulation 42 C.F.R. § 440.180 states:

- (a) ... “Home or community-based services” means services, not otherwise furnished under the State’s Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter.

...

3) The services are subject to the limits on FFP¹¹ described in § 441.310 of this chapter.

The Alaska Department of Health and Social Services administers the home and community-based services Medicaid waiver (HCBW or Waiver) program by applying AS 47.07.045 and also regulations found in the Alaska Administrative Code (AAC) at Title 7, Chapters 100 – 160.

Thus, home and community-based services received under the Waiver (HCBW or Waiver) program means services provided under AS 47.07.045. 7 AAC 160.990(26). One home and community-based services waiver program provides Medicaid benefits to eligible recipients who fall within the category of individuals with Intellectual and Developmental Disabilities (IDD) (formerly called mental retardation and developmental disabilities (MRDD)).¹² 7 AAC 130.200; 7 AAC 130.205; 7 AAC 140.600.

III. The Alaska Medicaid Home and Community-Based Waiver Services Program Regulations Pertinent to this Case.

The purpose of home and community-based services waiver programs is to offer a choice between home and community-based 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 130.200. Medicaid recipients who are eligible for Waiver services must complete a plan of care. 7 AAC 130.230.

IV. The Waiver Program For Intellectually and Developmentally Disabled Persons.

This case involves the Home and Community-Based Services Waiver program for Intellectually and Developmentally Disabled (IDD) persons. Qualified recipients may be eligible for benefits authorized by a number of Medicaid regulations.

A. Federal Statutes and Regulations.

The objective of the Medicaid IDD waiver program is to allow a qualified recipient to live elsewhere but in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). *See* 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 441.301(b)(1)(ii) and (iii)(B); 42 C.F.R. § 430.25(c)(2). To qualify for Medicaid HCBW benefits, an applicant must show a need for the level of care provided by an ICF/MR. *See* 42 C.F.R. § 440.150. Also, the applicant must show

¹¹ FFP is the acronym for Federal financial participation. *See* 42 C.F.R. § 441.310.

¹² The HCBW services program serves four primary categories of Medicaid recipients: a) aged; b) blind; c) physically or developmentally disabled; and d) mentally retarded persons. 7 AAC 130.200. Alaska has variously named programs for recipients of each category. E.g., Adults with Physical Disabilities (APD); Children with Complex Medical Conditions (CCMC); Mentally Retarded (now Intellectual) and Developmental Disabilities (MRDD); and Older Alaskans (OA). *See* www.hss.state.ak.us/dsds/grantservices/hcbwaivers.htm.

that without receipt of HCBW benefits, the applicant would have to live in a Medicaid funded ICF/MR. *See* 42 C.F.R. § 441.302(g).¹³

B. State Statutes.

Alaska Statute 47.07.030 requires recipients of Medicaid benefits to be offered all mandatory services required by the federal Medicaid program, as well as “only” specific optional services identified in AS 47.07.030(b). Alaska Statute 47.07.030(c) authorizes the Department of Health and Social Services to provide a service for which it has received a waiver from the federal government if the Alaska legislature has approved the waiver. Environmental modification services are not among the mandatory or optional services required by AS 47.07.030(a) or (b).

Alaska Statute 47.07.945 addresses home and community-based services provided through Medicaid funding. The term “environmental modification” is not defined in the chapter addressing HCBW services. *See* AS 47.07.900.

C. State Regulations.

Alaska administers the HCBW or Waiver program through regulations found at 7 AAC 130.200 – 7 AAC 130.319. The purpose of these 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.” 7 AAC 130.200.

1. 7 AAC 130.205. Regulation 7 AAC 130.205 provides that “for the Department to make payment under Medicaid for home and community-based waiver services provided to an individual” the individual must be eligible for coverage, and the services for which the individual is eligible must be services provided by applicable regulations of 7 AAC 130.200-7 AAC 130.319. 7 AAC 130.205(a). There are other requirements at subsections (b) through (h). Regulation 7 AAC 130.205(c) provides that a person receiving Waiver services “is eligible to receive other Medicaid services for which the recipient is otherwise eligible.”

More particularly, 7 AAC 130.205(f) specifies that Waiver services are payable only after a plan of care is approved as provided in 7 AAC 130.230.

2. 7 AAC 130.230. Regulation 7 AAC 130.230 is titled “Screening, assessment, plan of care and level-of-care determination.” This regulation requires an applicant for Waiver services to undergo an initial screening from a care coordinator to determine if an assessment is warranted, obtain an assessment to determine if the recipient falls into one of the four categories of persons for whom Waiver services are available, and to complete a plan of care approved by the department. Regulation 7 AAC 130.230(c) specifies a detailed list of duties the care coordinator must address in fashioning a plan of care, which then is presented to the department for consideration and approval.

¹³ States participating in the HCBW program are required to document their use/need for Medicaid funding to provide the services the state offers. 42 C.F.R. § 441.303.

There are additional regulations pertaining to Waiver services particularly applicable to persons diagnosed as Intellectually and Developmentally Disabled (IDD).¹⁴ If the individual falls within the category of persons with mental retardation and developmental disabilities, as in this case, a “comprehensive planning team” is required to collaborate in preparing the plan of care. 7 AAC 130.230(d).

If an approved plan of care is sought to be amended, regulation 7 AAC 130.230(g) applies, which states, in relevant part:

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.

3. 7 AAC 130.300 Environmental modification services. This regulation states, in relevant part:

(a) The department will pay for environmental modification services that (1) are approved under 7 AAC 130.230 as part of the recipient’s plan of care; and (2) receive prior authorization.

(b) The department will consider services to be environmental modification services if they make physical adaptations to the recipient’s home, as identified in the recipient’s plan of care, and are necessary to ensure the health, welfare, and safety of the recipient.

...

(d) The department will not pay under this section for

(1) modifications that increase the square footage of an existing residence, are part of a larger renovation to an existing residence, or are included in construction of a new residence;

(2) general utility adaptations, modifications, or improvements to the existing residence; for purposes of this paragraph, general utility adaptations

(A) include routine maintenance or improvements, including flooring and floor coverings, bathroom furnishings, carpeting, roof repair, central air conditioning, heating systems or sewer system replacement, appliances, cabinets, and shelves; and ...;

¹⁴ Three other groups eligible for Waiver services are: Adults with Physical Disabilities (“APD”), Children with Complex Medical Conditions (“CCMC”), and Older Alaskans (“OA”). See 7 AAC 130.230.

(B) do not include improvements made to substantially reduce the risk of serious injury or illness to the recipient if another practical modification is not available to reduce the risk;

(3) adaptations, modifications, or improvements to the exterior of the dwelling, including outbuildings, yards, driveways, and fences, except for adaptations, modifications, or improvements to doors, exterior stairs, and porches necessary for egress for the recipient;....

Regulation 7 AAC 130.319, titled “definitions” does not define “environmental modification. Regulation 7 AAC 130.319(4) defined “immediate family” as “includes the parents or minor siblings of a recipient under 18 years of age and the spouse of a recipient.”

ANALYSIS

I. Issue

On November 23, 2011, was the Division of Senior and Disabilities Services correct to deny Claimant’s request to amend her Plan of Care to add Medicaid payment for environmental modification services for the purpose of converting a garage into a bedroom for Claimant?

II. Burden of Proof and Standard of Proof

Claimant seeks additional Medicaid benefits in the form of Medicaid payment of the cost of converting a garage to a hospital-like bedroom. Claimant seeks to amend her plan of care and obtain Medicaid payment of environmental modification services. Therefore, Claimant is seeking to change the status quo and to obtain more benefits. Because individuals who seek Medicaid paid benefits must prove they are eligible for the services they seek and because Claimant is seeking to change her approved Plan of Care by adding additional services, Claimant bears the burden of proving she is eligible for Medicaid payment of the environmental modification services she seeks. *See* Principles of Law section above.

Claimant must prove by a preponderance of the evidence that the Division erred in denying her request to amend her Plan of Care to provide environmental modification services, or alternatively, prove that she is eligible for the services she seeks.

III. Proposed Amendments to a Plan of Care Are Governed by Regulation 7 AAC 130.230

First, Claimant must show that her proposed amendment to her plan of care meets the requirements for a change in plan of care. 7 AAC 130.300(a). Regulation 7 AAC 130.230(g) requires Claimant, through her care coordinator, to document the need for the changes to the plan of care which are sought. At the hearing there was no issue concerning the adequacy of the

documentation for Claimant's request to amend her Plan of Care to obtain environmental modification services.¹⁵

IV. Facts

The parties do not dispute that Claimant qualifies for, and receives, Medicaid benefits through the Home and Community Based Services Waiver (HCBW) program for Intellectually and Developmentally Disabled (IDD) persons. The parties do not dispute that Claimant needs services 24 hours a day, 7 days a week and that her health is deteriorating because she is terminally ill. This is supported by the facts. *See* Finding of Fact 2 and 6.

The dispute between the parties can be characterized as one where Claimant asserts she needs to have Medicaid pay to convert a 250 square foot garage into a bedroom which is 280 square feet in size, as an environmental modification of her residence. On the other hand, the Division believes that Claimant's asserted need is not within the scope of Medicaid funded environmental modifications. Its denial letter specified the reasons, described in Finding of Fact 19.

V. The Division Correctly Applied Regulation 7 AAC 130.300.

A. The Division Correctly Applied Regulation 7 AAC 130.300(b).

Regulation 7 AAC 130.300(b) states:

The department will consider services to be environmental modification services if they make physical adaptations to the recipient's home, as identified in the recipient's plan of care, and are necessary to ensure the health, welfare, and safety of the recipient.

This regulation makes clear that environmental modification services are not available for any location other than a recipient's home, as it is identified in the recipient's plan of care. Claimant's Plan of Care identifies her residence as her mother's home on Caroline Street.

Nor has Claimant's home changed to the house for which environmental modification is sought, albeit she spends substantial time there. Claimant's mother testified that, when Claimant is medically able, Claimant will have dinner, overnight and breakfast at her sister's home. Claimant's mother testified that Claimant spent 60-70 hours of the week prior to the hearing at her sister's home. A week has 168 hours (24 x 7). Therefore, Claimant spends the bulk of her time at her residence with her mother and not at her sister's.

In addition, Claimant spends her time at her sister's home because her sister is her care provider. When Claimant is at her home with her mother, her sister travels to her mother's home with Claimant and stays at her mother's home with Claimant because she is her care provider. The failure of Claimant's request to meet the requirements of 7 AAC 130.300(b) is made more clear by analogy. When Claimant stays overnight at her sister/care provider's house, she is provided a

¹⁵ However, the Division Reviewer's ability to consider whether other practical modifications were available to meet Claimant's needs was precluded because no photographs were provided. Thus, consideration of 7 AAC 130.300(d)(2)(B) was hampered.

bedroom by displacing a resident of the home from her bedroom. The bedroom is not Claimant's residence, it is her niece's residence. This is akin to being a guest, not a household resident. If Claimant spent time at the home of a care provider who was not her sister, her request likewise would not meet the requirements of the regulation.

Claimant's mother testified she built her house with Claimant's needs in mind. Claimant's mother testified that Claimant has all of her equipment at her mother's home and stays there when she needs to use her hospital bed. It is undisputed that Claimant is "technology dependent." The fact that Claimant's supplies and equipment are located at her mother's house, except as they are portable and travel with her, or there is space available to keep them at her sister's house, supports the determination that Claimant's 'primary' home is at her mother's house.

Clearly, Claimant's home is at her mother's house. However, Claimant's request is to amend her Plan of Care to acquire environmental modification services to a garage attached to a house which is not her (primary) residence. Claimant asserts she needs to have two residences: her residence at her mother's home and her alleged residence at her sister's home. Claimant initially stated in her Plan of Care that she "requires two homes to meet her ever changing needs." In her amendment request, Claimant stated that her sister's home will be her "primary residence at night and on those days when ambulation and/or transfer cannot occur." The regulation providing Medicaid payment of environmental modification services applies to a recipient's existing home, not all of the places the recipient occupies or receives care or expects to call a primary residence in the future. 7 AAC 130.300(b).

The law provides for Medicaid payment of environmental modifications to a recipient's home, "as identified in the recipient's plan of care." The proposed amendment request does not contemplate environmental modifications to Claimant's home, as it is identified in her plan of care or based on actual facts of Claimant's circumstances. Claimant has not shown she meets the requirements to be eligible for environmental modification services applied to her sister's house. Therefore, the Division was correct to deny Claimant's amendment request because the "request is to create a new living space for [Claimant] to live rather than to modify her current environment...."

B. The Division Correctly Applied Regulation 7 AAC 130.300 (d)(1): Modifications that increase the square footage of an existing residence.

Claimant's sister's home is described in a property assessment as having a garage measuring twenty (20) feet by twelve and one-half (12.5) feet. *See* Finding of Fact 17 and 18. This equals 250 square feet. Claimant's contractor's drawing of the changes to be made to the garage shows a structure measuring twenty (20) feet by fourteen feet. This equals 280 square feet. Claimant's mother could not explain the thirty (30) square foot increase in size. *See* Finding of Fact 18. Claimant's mother asserted there was no increase in the square footage of the existing residence but could not explain the discrepancy in sizes. Based on the information provided by Claimant, Claimant is not eligible for environmental modification services based on an increase in square footage, even without considering if the increase is to an "existing residence."

Moreover, Claimant's evidence clearly denoted the garage as not within the scope of livable area. *See* Finding of Fact 18. Claimant's evidence identifies the garage as space separate and distinct from the "liveable" area of the real property, albeit attached to it. But, hypothetically allowing Claimant's assertion that the garage falls within the definition of "residence," the fact is that Claimant is seeking an increase of 30 square feet to an existing residence. Application of the law requires the Division to deny Claimant's amendment request on this basis alone.

Therefore, Claimant did not prove she met the eligibility requirements for the environmental modification services of her amendment request or that the Division incorrectly denied Claimant's amendment request based on regulation 7 AAC 130.300(d)(1).

C. The Division Correctly Applied Regulation 7 AAC 130.300(d)(1): Modifications that are part of a larger renovation to an existing residence.

During Claimant's mother's testimony it became clear that an additional modification to the sister's house would be taking place in conjunction with the conversion of the garage.

First, the residential portion of the house would be modified by installation of a French door access to the garage. Arguably, this change could apply to the garage as well, but it would not be a change exclusive to the garage. Clearly, it would renovate the existing residence access to the garage.

Second, Claimant's mother testified the garage was below the level of the dining/living area and the garage. The requested environmental modification does not include addressing the different levels between the house and the proposed bedroom. Therefore, whatever construction is necessary would be paid by some source other than Medicaid and consequently would be part of a larger renovation.

Third, Claimant's Exhibit F, at page 14 showed some partially illegible writing at the base of the diagram which was explained by Claimant's mother as a "walling off" of the house furnace and hot water heater, and a blocking off of a window and, possibly, the back door of the garage. Claimant's mother testified she would be paying for these changes and the work is not included in the environmental modification services requested.

The furnace and hot water heater serve the existing residence and there is no evidence they serve the garage. The "walling off" would isolate the proposed bedroom from these utilities. These changes were not included as part of the requested environmental modification services and are renovations. The "walling off" of the furnace and hot water heater, and blocking off of the window and back door, clearly changes the functions which the garage serves for the remainder of the real property. The "walling off" creates a separate "utility room" type of space for the hot water and furnace functions of the home, and either removes or re-locates the window and door. In effect, the premises are to be renovated to provide a separate utility room and to remove these utility functions from the garage.

Alternatively, considering Claimant's mother's argument to be that there is no larger renovation to the existing residence because the "walling off" of this area is not part of the "existing

residence,” then she is asserting the garage is not part of the residence. If the garage is not part of the residence, it cannot be a residence for Claimant. If this is so, the Division is correct to deny the modification request under 7 AAC 130.300(b).

The Division was correct to deny the amendment request because the proposed modifications are part of a larger renovation to the existing residence. 7 AAC 130.300(d)(1).

D. The Division Correctly Applied Regulation 7 AAC 130.300(d)(2): General utility adaptations, modifications or improvement; flooring, floor coverings, carpeting.

It is undisputed Claimant’s amendment request included installing flooring, carpeting and carpet padding to create a bedroom like floor in the garage. The materials list included thirty (30) square yards of carpet and thirty (30) square yards of carpet pad. It is unclear if some of the materials described were to be used to build a false floor or ramp to provide Claimant access to the house. Please see the discussion in C. above.

Regulation 7 AAC 130.300(d)(2) does not permit payment for environmental modifications that are adaptations, modifications or improvements to general utilities, and specifies some prohibited items to include “flooring and floor coverings, ... carpeting...” Therefore, the Division was correct to deny Claimant’s amendment request because it sought payment for adaptation, modification and/or improvement to the floor of the garage.

E. The Division Correctly Applied Regulation 7 AAC 130.300(d)(2): General utility adaptations, modifications or improvement; electrical capacity.

It is undisputed Claimant’s amendment request included upgrading the electrical capacity of the garage. Presently, the garage has only electrical light. Claimant’s mother testified that one piece of Claimant’s medical equipment needs more power than the regular electric outlets provide. Regulation 7 AAC 130.300(d)(2) does not permit payment for adaptations, modifications or improvements to general utilities, “including” heating systems, air conditioning, etc. but does not specifically list electricity. The word “including” signifies the listing that follows is not exclusive. Electricity is commonly considered a utility. To accommodate Claimant’s need for circuit capacity to power her extensive equipment demand load, the overall electrical capacity would need to be upgraded from that of a garage light. Medicaid payment for this is not allowed by 7 AAC 130.300(d)(2).

Therefore, the Division was correct to deny Claimant’s amendment request because it sought adaptation, modification and/or improvement to the general electrical capacity of the garage.¹⁶

¹⁶ The regulation does not preclude adding the outlets proposed by Claimant’s amendment request. It does prohibit Medicaid payment for adapting, modifying or improving a general utility, which will occur if additional circuits and/or capacity are installed. Also, Claimant’s amendment request did not address providing heat to the garage, although the intention was to provide a ‘hospital-like bedroom’ for Claimant. It is unclear how Claimant’s needs for heat would be met without adaptation of the garage in this respect also, or if heat was to be provided as part of the larger renovation in conjunction with the furnace.

F. Claimant Did Not Prove that Without Receipt of the Environmental Modification Services Identified in Her Amendment Request She Would Need to Reside in an Institution.

The purpose of the services provided to a recipient receiving Medicaid paid Home and Community Based Services through a Waiver program is to prevent the recipient from being required to live in an institutional setting, which would be required absent receipt of specific provided services. 7 AAC 130.200; 42 C.F.R. § 441.302(g). *See also* 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 441.301(b)(1)(ii) and (iii)(B); 42 C.F.R. § 430.25(c)(2).

Claimant's mother testified that Claimant may need hospitalization, and perhaps an increased number of hospitalizations, if she is not provided with a space where all of her medical needs can be met immediately and that she believes the garage at her sister's home is the only place where that can happen. Claimant's mother testified that her goal was to prevent Claimant from needing hospitalization because Claimant was susceptible to acquiring illness while in the hospital. There was no evidence that Claimant would be required to leave her mother's house to live in an institution if the amendment request was not granted.

Therefore, Claimant did not prove that if she does not receive the environmental modification services identified in her amendment request, she will be required to live in a Medicaid funded Intermediate Care Facility for the Mentally Retarded. 42 C.F.R. § 441.302(g).

CONCLUSIONS OF LAW

1. Claimant failed to meet her burden of proving by a preponderance of the evidence that:
 - a. Her proposed amendment request was for environmental modification services to her home, as identified in her Plan of Care. 7 AAC 130.300(b).
 - b. Her proposed amendment request did not increase the square footage of an existing residence. 7 AAC 130.300 (d)(1).
 - c. The environmental modifications in her proposed amendment request were not part of a larger renovation of an existing residence. 7 AAC 130.300 (d)(1).
 - d. The environmental modifications in her proposed amendment request did not include flooring, floor coverings, or carpeting. 7 AAC 130.300 (d)(2).
 - e. The environmental modifications in her proposed amendment request did not include adaptations, modifications, or improvements to the general electrical utility of the existing residence. 7 AAC 130.300 (d)(2).
 - f. If she does not receive the environmental modification services identified in her amendment request she will be required to live in a Medicaid funded Intermediate Care Facility for the Mentally Retarded or other institutional setting. 42 C.F.R. § 441.302(g); 7 AAC 130.200.

2. The Division of Senior and Disabilities Services correctly applied regulation 7 AAC 130.300 when it denied Claimant's November 17, 2011 request to amend her Plan of Care to add receipt of environmental modification services.

DECISION

On November 23, 2011, the Division was correct to deny Claimant's proposed amendment to her Plan of Care requesting Medicaid to pay for environmental modification services to convert a garage into a bedroom at her sister's residence. 7 AAC 130.300(b), (d).

APPEAL RIGHTS

If for any reason Claimant is not satisfied with this decision, Claimant has the right to appeal by requesting a review by the Director. An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision. To appeal, Claimant must send a written request directly to:

Director of Senior and Disabilities Services
Department of Health and Social Services
550 W. 8th Avenue
Anchorage, Alaska 99501

DATED March 8, 2012.

/signed/

Claire Steffens
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on March 9, 2012 true and correct copies of the foregoing were sent to:
Claimant, by U.S.P.S. certified mail
and on to the following persons via secure, encrypted e-mail:
Division of Senior and Disabilities Services, via Kimberly Allen, Asst. Attorney General
Mark Choate, c/o choatelawfirm.com, Claimant's representative, courtesy copy
[REDACTED], Hearing Representative
[REDACTED], Director, DSDS
[REDACTED], Chief, Policy & Program Dev.
[REDACTED], Eligibility Technician
[REDACTED], Staff Development & Training

/signed/

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