IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

S[redacted] R[redacted],	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES	)	
	)	
	)	
Appellee.	)	Case No. 3AN-13-[redacted]CI
	)	

ORDER ON APPEAL

INTRODUCTION

The Department of Health and Social Services ("DHSS") terminated S[redacted] R[redacted] from the Home and Community Based Waiver Program ("Waiver Program") on May 31, 2013. Ms. R[redacted] subsequently instituted this appeal. This court has jurisdiction over this appeal under AS § 22.10.020(d) and Alaska Appellate Rule 602(a)(2).

Background Facts:

The Waiver Program, part of Medicaid and implemented through DHSS, provides home care services equivalent to that provided in a nursing home to qualifying adults who have a disability requiring attention.[1] It is uncontested that Ms. R[redacted] needs

[1] AS 47.07.045.

some personal care assistance, however, the level needed is in dispute.[2] Ms. R[redacted] has received State care for various injuries since 2005. As required, from 2005-2012, the State assessed her condition using Consumer Assessment Tools ("CAT"). From 2005-2007, Ms. R[redacted] qualified for Waiver Program services. Beginning in 2007, her CATs qualified her only for a personal care assistant, not the higher level of care provided under the Waiver Program. However, the State was unable to terminate Ms. R[redacted] from the Waiver Program because the statutorily-required third party review had not yet been implemented. Thus, Ms. R[redacted] was eligible to continue to utilize Waiver Program services, though she did not need them and chose not to. In 2012, the Legislature enacted the statute that allowed the State to terminate Waiver Program services. The process unfolded for Ms. R[redacted] and this appeal stems from the State's May 2013 decision that she has materially improved from her 2005 CAT to the point that she no longer qualifies for the Waiver Program.

Parties' Positions

Ms. R[redacted] argues that the State's decision is not supported by substantial evidence because persuasive contrary evidence was ignored. Furthermore, she argues that the State violated her due process rights by not providing her the opportunity to cross-examine the CAT author and by issuing a short opinion void of necessary details.

The State, relying to a great extent upon the 2012 CAT, asserts that the decision is supported by substantial evidence of material improvement. Additionally, the State denies depriving Ms. R[redacted] of any due process, contending that she received a

[2] Brief of Appellee at 3.

fair opportunity to be heard.

STANDARD OF REVIEW

When reviewing agency decisions, the Alaska Supreme Court "recognize[s] four principal standards of review."[3] First, for questions of fact, the court utilizes the "substantial evidence test." "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[4] The court must "merely note of its presence," not reevaluate its strength.[5] This standard is utilized in order to leave the evidence weighing function of the administrative agency intact, relative to the reviewing capacity of the superior court.[6]

Second, "for questions of law involving agency expertise", courts apply the "reasonable basis test."[7] When courts face these types of questions, "deference should be given to the administrative interpretation, since the expertise of the agency would be of material assistance to the court."[8] So, courts apply a high level of deference unless the agency's interpretation was "plainly erroneous and inconsistent with the regulation."[9]

Third, when courts consider "questions of law where no expertise is involved,"

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[3] *State, Dep't of Health & Soc. Servs. v. North Star Hosp.*, 280 P.3d 575, 579 (Alaska 2012) (citing *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992); *Jager v. State*, 537 P.2d 1100, 1107 n. 23 (Alaska 1975)).
[4] *Handley*, 838 P.2d at 1233 (citing *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963)).
[5] *Id.* (citing *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 179, n.26 (Alaska 1986)).
[6] *Id.*
[7] *North Star Hosp.*, 280 P.3d at 579 (citing *Handley*, 838 P.2d at 1233; *Jager*, 537 P.2d at 1107, n. 23)).
[8] *Swindel v. Kelly*, 499 P.2d 291, 298 (Alaska 1972) (citing *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971)).
[9] *May v. State, Commercial Fisheries Entry Com'n*, 175 P.2d 1211, 1216 (2007) (citing *Simpson v. State, Commercial Fishers Entry Com'n*, 101 P.3d 605, 609 (Alaska 2004)).

they utilize the "substitution of judgment test."[10] In such situations, "courts are at least as capable of deciding this kind of question."[11]

Finally, when reviewing administrative regulations, the Court applies the "reasonable and not arbitrary test."[12] "[W]here an agency interprets its own regulation…a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue."[13] Under this standard, courts merely decide whether there is a "reasonable basis" for the agency's interpretation of the regulations.[14]

DISCUSSION

Ms. R[redacted] asserts a variety of arguments in her brief. Most address situations in which the court would be inclined to defer to the agency's expertise. However, her contention that the State violated her due process rights falls within the particular expertise of the courts. And if she succeeds on that argument, it is dispositive for this case. Because, as set forth below, this court concludes that her due process rights were violated, none of the other arguments she has raised will be addressed. Since a remand will be necessary, the DHSS, as it sees fit, will have the opportunity to readdress any failings she has noted.

Ms. R[redacted]'s 2012 CAT was authored by Registered Nurse Mattson, but

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[10] *North Star Hosp.*, 280 P.3d at 579 (Alaska 2012) (citing *Handley*, 838 P.2d at 1233; *Jager*, 537 P.2d at 1107 n. 23)).
[11] *Swindel*, 499 P.2d at 298 (citing *Kelly*, 486 P.2d at 911).
[12] *North Star Hosp.*, 280 P.3d at 579 (citing *Handley*, 838 P.2d at 1233; *Jager*, 537 P.2d at 1107 n. 23)).
[13] *Handley*, 838 P.2d at 1233 (citing *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982)).
[14] *Rose*, 647 P.2d at 161.

Nurse Mattson did not testify at the administrative hearing. Nevertheless, the agency chose to rely heavily upon Nurse Mattson's CAT to counter the oral testimony from Ms. R[redacted]'s witnesses that the ALJ relied upon. The right to cross-examine is fundamental in both the Alaska and Federal Constitutions as a vital truth-discovering device.[15] Federal law regarding Medicaid program waivers like this one also require an opportunity to confront and cross-examine important witnesses.[16] The Alaska Supreme Court has specifically held that the right to cross-examine authors of written medical evidence in an administrative setting is absolute in "light of the absence of a system requiring notice of intention to cross-examine to be filed before hearing when medical reports are served upon opposing parties."[17] The Administrative Procedure Act provides the basis for such right to cross-examine in an administrative hearing.[18] This Act is applicable to DHSS hearings[19] and there does not appear to be any other authority that would curtail Ms. R[redacted]'s right to cross-examine Nurse Mattson.[20] This witness never testified as to how she graded the CAT or the evidence she relied

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[15] *Blue v. State*, 558 P.2d 636, 643 (Alaska 1977); *see also Lemon v. State*, 514 P.2d 1151, 1153 (Alaska 1973) ("The right of confrontation…guarantees him the opportunity to cross-examine the witnesses against him so as to test their sincerity, memory, ability to perceive and relate, and the factual basis of their statements.").

[16] 42 C.F.R. § 431.2429(e).

[17] *Commercial Union Cos. v. Smallwood*, 550 P.2d 1261, 1266 (Alaska 1976) (further holding "appellants did not waive their right of cross-examination in the case at bar by virtue of their failure to subpoena the authors of the medical reports."); *see also Employers Commercial Union Ins. Group v. Schoen*, 519 P.2d 819, 824 ("We therefore hold that the statutory right to cross-examination is absolute and applicable to the Board").

[18] *Schoen*, 519 P.2d at 823.

[19] AS § 44.62.330(a)(16).

[20] There is a statute on point that requires the to State notify Ms. R[redacted] of any witnesses it intends to testify via affidavit, whereupon Ms. R[redacted] must reserve the right to cross-examine them or her right to do so is waived. AS. § 44.62.470. However, there is no evidence in the record that the State provided Ms. R[redacted] with this notice. Additionally, Nurse Mattson's CAT is not an affidavit, but rather a report for the purpose of determining eligibility. Lastly, as discussed below, the State has not even raised the waiver argument.

upon in authoring it. Ms. R[redacted] had a fundamental right to confront Ms. Mattson and that right has been violated.

There may be an argument that Ms. R[redacted] had the opportunity to call Nurse Mattson and she waived that right. However, that argument has not been made by the State. On the other hand, though not raised very effectively, Ms. R[redacted]'s Post-Hearing Brief did discuss her inability to cross-examine Ms. Mattson, asserting that "no nurse who performed any of Ms. R[redacted]'s assessments testified or was subject to cross-examination."[21] Her objection was not raised in the due process context but rather as a basis to assign less weight to the CAT evidence. Nevertheless, this court holds that because cross-examination is so deeply rooted in both our federal and state constitutions, she sufficiently raised the issue.

Because Ms. R[redacted] was deprived of her fundamental right to cross-examine the author of her 2012 CAT, upon which the DHSS relied as a basis for its termination decision, the process violated her due process rights. The remedy for such violations is remand back to the agency.[22] Accordingly, this court remands Ms. R[redacted]'s case with instructions to allow her to fully cross-examine Nurse Mattson regarding any of the CATs she authored, or upon which the DHSS intends to rely. Ms. R[redacted] must then be allowed to develop her arguments in full before the agency reaches its final conclusion.

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[21] Claimant's Post-Hearing Brief at 6; *see also* Claimant's Reply to State's Closing Brief at 2 ("[T]he assessor who performed the CAT did not testify at the hearing and was not subject to cross-examination.").

[22] *Hartman v. State, Dept. of Admin., Div. of Motor Vehicles*, 152 P.3d 1118, 1125 (Alaska 2007).

CONCLUSION

These proceedings are remanded to the DHSS for further factual findings. To the extent it remains pending, the motion for a stay is also DENIED.

IT IS HEREBY ORDERED.

Dated at Anchorage, Alaska this 15th day of September, 2014

[redacted]

Kevin M. Saxby
Superior Court Judge

I certify that on 9/16/14 a copy of the above was mailed to each of the following at their addresses of record:

[redacted]

Administrative Assistant