BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	OAH No. 13-1809-MDS
S U	)	Agency No.
	)	

DECISION DISMISSING CASE

I. Introduction

S U receives Medicaid Home and Community-based Waiver (Waiver) benefits. He was notified by the Division of Senior and Disabilities Services (Division) on November 1, 2013 that his Waiver benefits would be terminated. The Administrative Law Judge (ALJ) reviewed the Division's November 1, 2013 termination notice. That review revealed that the notice referred to regulations 7 AAC 130.210 and 7 AAC 130.230 as supporting Mr. U's disenrollment from Waiver benefits.[1] However, both 7 AAC 130.210 and 230 were repealed effective July 1, 2013.[2]

A status conference was held in this case on March 4, 2014. During that status conference, the ALJ, acting *sua sponte*, advised the parties that there was a notice issue and asked the parties to brief the issue. The parties' briefing was completed on March 28, 2014.

For the reasons discussed below, this case is dismissed because the Division has not complied with the federal and state Medicaid regulations regarding notice requirements. The Division must provide Mr. U with notice that complies with regulatory requirements if it wishes to proceed with termination of his Waiver benefits. At that point, if Mr. U wishes to contest the termination of his benefits, he may request a new hearing.

II. Facts[3]

The facts that are pertinent to this case are as follows:

- Mr. U was receiving Waiver benefits in May 2013.
- He was reassessed on May 24, 2013 to determine whether he continued to be eligible for Waiver benefits. That assessment found that he was no longer eligible for Waiver services.[4]

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1 Ex. D, pp. 1 - 2.
2 Alaska Administrative Code Register 206 effective July 1, 2013.
3 All references to exhibits are to those filed by the Division.
4 Ex. E, p. 29.

- The Division conducted a second-level review of the assessment's finding, and on October 9, 2013, its internal reviewer concurred that Mr. U was no longer eligible for Waiver services.[5]
- The Division then submitted Mr. U's case to Qualis Health, its third-party reviewer. Qualis conducted its review on October 31, 2013 and concurred that Mr. U was no longer eligible for Waiver services.[6]
- The Division then sent notice to Mr. U on November 1, 2013, advising him that his Waiver benefits would be terminated 30 days after the date of that notice. The notice cited to 7 AAC 130.210 and 7 AAC 130.230 as two of the regulations that supported its action.[7]
- 7 AAC 130.210 and 230 were repealed effective July 1, 2013. They were replaced by 7 AAC 130.213 and 219 which were effective July 1, 2013.
- The Division's November 1, 2013 notice does not mention either 7 AAC 130.213 or 219.[8]

III. Discussion

A. Notice Requirements

7 AAC 49.010 *et seq.* is the section of the Alaska regulations that sets out the procedural requirements for "Fair Hearings." 7 AAC 49.010(c) specifically provides that "Federal regulations relating to hearings within the Medicaid program under 42 C.F.R. 431.220 – 431.250 . . . take precedence where inconsistent with the requirements of this chapter and 2 AAC 64."

Under the Alaska Fair Hearing regulations, the Division must provide written notice to applicants prior to the date it "intends to take action denying, reducing, suspending, or terminating assistance . . ."[9] That written notice must contain "the reasons for the proposed action, including the statute, regulation, or policy upon which that action is based."[10] The federal Medicaid regulation regarding notice requirements, 42 C.F.R. § 431.210, is similar to the Alaska regulations. It, however, requires that the notice "must contain . . . (c) The specific regulations that support, or the change in Federal or State law that requires, the action."[11]

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5 Ex. F, pp. 37 – 39.
6 Ex. G, pp. 5 – 7.
7 Ex. D, p. 1.
8 Ex. D, p. 1.
9 7 AAC 49.060.
10 7 AAC 49.070.
11 42 C.F.R. § 431.210.

In two cases dealing with the Department of Health and Social Services' administration of two federal programs, the Medicaid program and the Food Stamp program, the Alaska Supreme Court has held that in order to comply with procedural due process requirements, the Department was required to comply with applicable federal notice requirements. In the *Baker* case,[12] the Court held that the Department's notices, informing Medicaid Personal Care Assistant (PCA) service recipients that those services were terminated or reduced, were defective. "Because the notices did not sufficiently explain the reasons for reductions in service, we hold that they failed to comply with constitutional and regulatory requirement."[13] In that decision, the Court specifically referred to both the state Fair Hearing regulation and federal Medicaid hearing regulation as embodying constitutional due process notice requirements.[14] In the *Allen* case,[15] the Court held that the Department's notice informing a Food Stamp recipient that it had an overpayment claim against her was defective because it did not comply with federal Food Stamp notice requirements.[16]

A federal case from the District of Arizona, involving the termination of Medicaid benefits, sheds further light on the nature of the federal requirements that the Alaska Supreme Court requires the Division to follow. The federal court held that a termination notice that contained references to general program rules and string citations was defective. The notice must contain the citation to the correct legal authority:

> Providing incorrect, cryptic or inaccessible citations without further guidance to low-income individuals is providing no[t] any guidance at all. While citing to the general provisions is rudimentary, the applicable provision as applied to the particular case is mandatory.[17]

The Division's November 1, 2013 notice, on its face, does not comply with the federal regulation. It cites to 7 AAC 130.210 and 230 as supporting its disenrollment of Mr. U from the Waiver program. 7 AAC 130.210 is the specific regulation that authorized Waiver disenrollment prior to July 1, 2013. 7 AAC 130.230 is the specific regulation that provided for an annual reassessment prior to July 1, 2013. Both of these were repealed effective July 1, 2013. In the regulations that were adopted effective July 1, 2013, 7 AAC 130.213 is the regulation that

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12 *Baker v State, Dep't of Health and Social Services*, 191 P.3d 1005 (Alaska 2008).
13 *Baker*, 191 P. 3d at 1007.
14 *Baker*, 191 P.3d at 1009 n. 13.
15 *Allen v. State, Dep't of Health and Social Services*, 203 P.3d 1155 (Alaska 2009).
16 *Allen*, 203 P.3d at 1167 – 1169.
17 *Rodriquez v. Chen*, 985 F. Supp. 1189, 1196 (D. Ariz 1996).

addresses reassessment, and 7 AAC 130.219 is the regulation that addresses disenrollment. The Division's November 1, 2013 notice therefore failed to contain "[t]he specific regulations that support . . . the [Division's] action." It should be noted that the repeal of 7 AAC 130.210 and 230 and their replacements by 7 AAC 130.213 and 219 were not mere renumbering of the regulations. For example, 7 AAC 130.219(e)(4) incorporates the third-party review process, prior to disenrollment of a Waiver recipient, required by AS 47.07.045(b)(2), whereas its predecessor, 7 AAC 130.210, authorized disenrollment without requiring compliance with the third-party review process.[18]

The Division has advanced three arguments regarding its Waiver termination notice. Its first argument does not address the validity of the notice. Instead, the Division argued that an ALJ "does not have authority to determine matters that are strictly questions of law."[19] In support of this argument, it cites the Alaska Supreme Court case of *Stein v. Kelso.*[20] The exact language of the Division's briefing is:

> First, the Division submits that an administrative judge does not have authority to determine matters that are strictly questions of law. "The deciding officer in an administrative hearing has the responsibility to conduct a trial-like adjudication in a fair manner and to make decisions needed to expedite the adjudication . . . However, the determination whether a state action or procedure violates the due process protections of the state and federal constitutions is a question of law" that is reserved for the superior court.[21]

As pointed out by Mr. U, the Division has misleadingly truncated the quote from the *Stein* case to support its argument. The Alaska Supreme Court's statement in that case is that "the 'determination whether a state action or procedure violates the due process protections of the state and federal constitutions is a question of law, and we review the matter using our

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18 7 AAC 130.210(a) reads, in pertinent part, "[t]he department will disenroll a recipient for one or more of the following reasons: (1) the recipient is no longer eligible for Medicaid coverage under AS 47.07.020, 7 AAC 100.002, and 7 AAC 130.205(d). 7 AAC 130.219 reads, in pertinent part:

> (e) The department will disenroll a recipient for any of the following reasons:
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> ***
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> (4) the recipient is no longer eligible for services because the recipient's reassessment, conducted in accordance with 7 AAC 130.213(c) – (f), indicates the condition that made the recipient eligible for services has materially improved since the previous assessment, and
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> (A) the annual assessment and determination have been reviewed in accordance with AS 47.07.045(b)(2).

19 *Division's Points And Authorities In Reply To The ALJ's Question Concerning Notice*, pp. 1 - 2.

20 *Stein v. Kelso*, 846 P.2d 123, 126 (Alaska 1993).

21 *Division's Points And Authorities In Reply To The ALJ's Question Concerning Notice*, pp. 1 – 2, citing to *Stein v. Kelso*, 846 P.2d 123, 126 (Alaska 1993).

independent judgment.'"[22] The *Stein* case nowhere states that an ALJ does not have authority to address legal issues; it instead states that the appellate standard of *review* for legal questions is one of independent judgment.[23] The Division's argument is frivolous; it would not allow an ALJ to make any legal rulings whatsoever, and would leave the Commissioner, as final decisionmaker, wholly without any legal framework for rendering the ultimate decision.

The Division's second argument is that Mr. U was required to raise the notice issue and needed to show prejudice: "[t]he claimant has neither raised the issue, nor shown what prejudice occurred as a result of the notice."[24] This argument is also not persuasive. First, the ALJ is not aware of any limitation on his ability to notify the parties of an issue, and to request them to address it. Second, a review of the recording of the March 4, 2014 status hearing demonstrates that Mr. U's counsel asserted the notice issue. Third, in the *Allen* case, the Court cited to and quoted from a federal case holding that a showing of prejudice was not required: "'Defendants cite no authority for the . . . argument . . . that plaintiffs must show that they were actually harmed by inadequate notice—and the Court finds it to be without merit.'"[25] The Division's third argument was that the Division's citation to repealed regulations did not render the notice defective because they were the regulations in effect at the time of Mr. U's assessment visit. The Division cites to a recent Office of Administrative Hearings case, *In re E. D.,* in support of the proposition that the Division was only required to cite the regulations in effect at the time of Mr. U's assessment. That case involved a wholly different context: it dealt with an application request for new services, and it stands only for the straightforward principle that the law governing an application for benefits is the law in effect when the application was made.[26] This case involves a termination of benefits. The Division did not take action on Mr. U's case at the time of his May 24, 2013 assessment visit. It first did an internal review on October 9, 2013. It then submitted the case for the external third-party review, which was completed on October 31, 2013. Then it took action on November 1, 2013, when it notified Mr. U that his Waiver eligibility was being terminated. The regulations in effect at the time the Division acted were the ones that had become effective the preceding summer. By federal regulation, the notice had to

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[22] *Stein* at 126 (citing *Carvalho v. Carvalho*, 838 P.2d 259, 261 n. 4. (Alaska 1992)).

[23] It is troubling that the Division's experienced counsel misstated the holding in an appellate decision in such an apparently deliberate way. *Cf. Alaska Rules of Professional Conduct* Rules 3.3 and 9.1(r).

[24] *Division's Points And Authorities In Reply To The ALJ's Question Concerning Notice*, p. 2.

[25] *Allen*, 1169 n. 68 (quoting from *Ortiz v. Eichler*, 616 F.Supp 1046, 1062, *aff'd*, 794 F.2d 889 (3d Cir. 1986)).

[26] *In re E. D.*, OAH No. 13-1369-MDS (Commissioner Health & Social Services, 2014). http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131369.pdf

contain the specific regulations that supported its action at the time it took its action.[27] It was defective because it did not.

B. Remedy

As stated in the *Allen* case, the Division must provide Mr. U with "notice[s] that comply with the federal regulation requirements" before it can proceed further.[28] It is not, however, possible to simply vacate the hearing and stay the case pending renoticing. Under state and federal regulations, a final decision (final administrative action) is required to be issued within 90 days after the date a recipient requests a hearing.[29] While that time frame can be extended to allow for continuances, there is also a 120 day deadline for issuance of ALJ decisions, that can only be extended by consent of all parties, consent by the assigned ALJ, and approval of the Chief ALJ.[30] These regulatorily authorized extensions, however, do not contemplate a stay or an indefinite extension pending an action by one of the parties. Consequently, the case must be dismissed. The Division has had the right to renotice Mr. U at any time since this issue was first brought to its attention, and it continues to have that right today.

IV. Conclusion

The Division's November 1, 2013 notice informing Mr. U that his Waiver benefits were terminated was legally defective because it did not cite Mr. U to the specific regulations, 7 AAC 130.213 and 7 AAC 130.219, that addressed Waiver disenrollment. This case is therefore dismissed.

DATED: April 9, 2014.

Signed
Lawrence A. Pederson
Administrative Law Judge

27 42 C.F.R. § 431.210(c).
28 *Allen* at 1169.
29 7 AAC 49.180; 42 C.F.R. § 431.244(f)(1).
30 AS 44.64.060(d).

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COMMISSIONER'S DECISION

S U receives Medicaid Home and Community-based Waiver (Waiver) benefits. He was notified by the Division of Senior and Disabilities Services (Division) on November 1, 2013 that his Waiver benefits would be terminated. The Administrative Law Judge (ALJ) issued a proposed decision that reversed the Division's termination action because the notice cited to repealed regulations. Those repealed regulations were in effect on May 24, 2013, the date Mr. U was assessed to determine his continuing eligibility for Waiver benefits. They, however, were repealed effective July 1, 2013, and were not in effect as of November 1, 2013, the date the Division notified Mr. U of its decision to terminate his Waiver benefits.

The proposed decision is premised upon an interpretation of two regulations that govern the contents of notices required to be sent to benefit recipients prior to their benefits being denied, modified, or terminated. Those are federal regulation 42 C.F.R. § 431.210(c) and its counterpart state regulation 7 AAC 49.070. The proposed decision interprets those regulations to hold that termination notices must cite to the regulations in effect at the time of the termination decision, even though the termination was based upon an assessment which was conducted at an earlier time when different regulations were in effect.

In accordance with AS 44.64.060(e)(5), the Commissioner of Health and Social Services rejects the proposed decision's interpretation of the notice regulations, and consistent with the holding in *In re E. D.*[31], holds that the Division's termination notice was only required to cite the regulations in effect at the time of Mr. U's assessment. The Division's notice was therefore adequate.

In this particular case, this holding would normally result in a remand of this case to the ALJ for an evidentiary hearing. However, the Division's proposal for action requests instead "that the commissioner or his designee reject the holding in the proposed decision and return the

[31] *In re E. D.*, OAH No. 13-1369-MDS (Commissioner Health & Social Services, 2014). This decision is available online at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131369.pdf

case to the agency with instructions to conduct a new assessment and issue a notice using the regulations in [effect] at the time of the new assessment."[32] Given the Division's willingness to have a new assessment performed and the lack of prejudice to Mr. U,[33] the proposed decision is rejected and the matter is remanded to the Division "with instructions that it conduct a new assessment and issue a notice using the regulations in [effect] at the time of the new assessment." This Commissioner's Decision constitutes the final decision of the Commissioner in this case.

APPEAL RIGHTS

This decision is the final administrative action in this proceeding. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 20th day of May, 2014.

By: *Signed*
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

[This document has been modified to conform to the technical standards for publication.]

[32] Division Proposal for Action, p. 2.

[33] Because Mr. U has not had his Medicaid Waiver benefits terminated, he will continue to receive those benefits pending the result of the new assessment.