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

In the Matter of	)	
	)	
K S	)	OAH No. 17-0671-MDS
	)	Agency No.

DECISION AFTER REMAND

I. Introduction

The Division of Senior and Disabilities Services (Division) issued K S written notice that it was reducing her Medicaid Personal Care Services (PCS). Ms. S appealed. A proposed decision was issued finding that the PCS reduction was reversed because the Division did not provide Ms. S with adequate notice. After the proposed decision was issued, and the parties had to opportunity to file proposals for action, the Commissioner did not adopt the proposed decision and instead remanded the case

> to the administrative law judge to issue a revised decision that specifically addresses the federal Medicaid notice requirement set forth in 42 CFR 431.206. The ultimate conclusion of the decision, however, remains the same.[1]

This revised decision is issued in accordance with the Commissioner's instructions.[2] The reduction of Ms. S's Medicaid PCS is REVERSED because the Division failed to provide her with adequate notice, which included a failure to comply with federal Medicaid notice requirements, as discussed below.

II. Facts

Ms. S is legally blind. She was receiving Medicaid PCS in 2017 based upon a settlement that was reached with the Division in a 2016 Medicaid PCS case (OAH Case No. 16-0785-MDS). On June 19, 2017, Ms. S received a written notice that her PCS were being reduced effective June 29, 2017. Ms. S cannot read due to her blindness. She was not sent a braille version of the notice, nor did someone from the Division provide her with an oral version of the notice. A copy of the notice was sent to her PCS provider.[3]

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1 *Order Remanding Decision* dated October 20, 2017.

2 This Decision after Remand also corrects typographical errors in the original decision. For instance, the Conclusion section in the September 29, 2017 proposed decision refers to the Medicaid Waiver program, when this case only deals with the Medicaid PCS program. *See* 2 AAC 64.350(b) (the final decision-maker may "correct typographical or other manifest errors.").

3 Ms. S's testimony; Ex. D.

III. Discussion

Ms. S cannot read written notices. She argued that the Division sending her a written notice was ineffective because it failed to comply with the Americans with Disabilities Act (ADA). It must first be noted that the ADA applies to state and local government services:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[4]

Two recent federal ADA cases demonstrate that a state agency is required to provide disabled individuals with information in a format that they can follow or is otherwise required to assist them. In *National Federal of the Blind v. Lamone*, the Fourth Circuit Court of Appeals held that Maryland's practice of requiring a voter with a blank hardcopy absentee ballot, which had to be marked by hand, violated the ADA because it denied some disabled voters with "meaningful access to absentee voting."[5] In *King v. Marion Circuit Court*, the federal District Court held that Indiana Marion County Circuit Court was required to provide a deaf party with an American Sign Language interpreter as part of its pretrial mediation program:

> A public entity is required to "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a).[6]

The Medicaid program has its own notice requirements that mirror those of the ADA. The applicable Medicaid regulation 42 C.F.R. § 431.206 "Informing applicants and beneficiaries" explicitly states that the hearing notice "must be accessible . . . to individuals with disabilities . . ." [7] Finally, in *Baker v. State*, a case involving procedural due process notice requirement for termination or reduction of PCS, the Alaska Supreme Court held that before the Division terminated or reduced benefits, it must first provide adequate notice to recipients:

> due process demands that recipients facing a reduction in their public assistance benefits be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department's action.[8]

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4 42 USC § 12132.

5 *National Federal of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016).

6 *King v. Marion Circuit Court*, Case 1:14-CV-01092-JMS-MJD (S.D. Indiana, Indianapolis Division May 27, 2016).

7 7 C.F.R. § 431.206(e).

8 *Baker v. State, Dept. of Health and Social Services*, 191 P.3d 1005, 1011 (Alaska 2008).

Importantly, the context in which *Baker* was decided makes it clear that this requirement attached at the point of the initial agency decision, **before** administrative appeal.

Construing federal Medicaid notice requirements, the *Baker* notice requirements, and the ADA requirements together leads to the inexorable conclusion that the Division's written notice to Ms. S that it was reducing her benefits failed to comply with minimum procedural due process notice requirements. Sending a written notice to a blind person is tantamount to no notice at all. Consequently, the Division may not seek to reduce Ms. S's PCS until it provides adequate notice.[9]

In Ms. S's case, a proper notice must be provided to her in an effective communication format. As noted in the Department of Justice Civil Rights Division *Disability Rights Section* website: "[f]or example, people who are blind may give and receive information audibly rather than in writing." [10]

Providing written notice to Ms. S's PCS provider is not a substitute for notice to Ms. S. This is because the Department's regulations prohibit providers from representing their clients [11]

IV. Conclusion

The Division's reduction of Ms. S's PCS is REVERSED.

DATED this 17th day of November, 2017.

Signed
Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 20th day of November, 2017.

By: *Signed*
Deborah Erickson, Project Coordinator
Office of the Commissioner
Department of Health and Social Service

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

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9 The Division may pursue this reduction action if it renotices Ms. S. *See Allen v. State, Dept. of Health and Social Services*, 203 P.2d 1155, 1169 (Alaska 2009).

10 *See* https://www.ada.gov/effective-comm.htm (date accessed October 2, 2017).

11 7 AAC 125.010(b)(4)(B).