

B has a history of defiance and relational discord with his parents.⁶ He has engaged in substantial negative and unsafe behavior towards his siblings. B has anger issues, and has displayed physical and emotional aggression.⁷ For example, he has exhibited sexualized behavior towards Z and attempted to set fire to Z's bed and Ms. N's sister's home.⁸ These behaviors negatively affected all B's siblings and his parents.⁹

B's biological siblings also have difficulties stemming from abuse and neglect experienced prior to their placement with Ms. N and Ms. U. All three of B's biological siblings have individualized education programs and receive psychological services.¹⁰ Even with these challenges, Ms. N and Ms. U are fully committed to their children and work to achieve positive family outcomes.¹¹

B has been at No Name, a Residential Psychiatric Treatment Center (NN) in Oregon, since January 22, 2014.¹² A typical stay at No Name is 90 days.¹³ B has been there over ten months and the plan is for him to return home in December 2014.¹⁴

A. Preauthorization request and denial

On July 9, 2014, C J, a Licensed Marriage and Family Therapist and B's therapist at No Name, requested travel preauthorization for B's five family members to travel to Oregon for family therapy from July 21 – 24, 2014.¹⁵ The request consisted of a four-page letter from Mr. J, with B's June 18, 2014 Individual Services and Support Plan (ISSP) attached.¹⁶ The request and Mr. J's testimony outlined multiple goals for the family therapy visit, primarily aimed at improving B's relationships with his parents and siblings. The request specifically requested July travel dates, but stated, "It is strongly endorsed that frequent family visitation (monthly) is not only relationally positive but absolutely necessary in order for B to practice relational success before he returns home."¹⁷

⁶ Ex. F, p. 3 – 21.
⁷ Ex. F, p. 4.
⁸ Ex. F; N testimony.
⁹ Ex. F, p. 4.
¹⁰ N testimony.
¹¹ J testimony.
¹² Ex. F.
¹³ J testimony.
¹⁴ J testimony.
¹⁵ Ex. F, p. 3 – 21.
¹⁶ Ex. F, p. 3 – 19.
¹⁷ Ex. F, p. 3- 4.

On July 17, 2104, the Division denied the request.¹⁸ The Division did not deny family therapy itself, but denied travel authorization for five family members to attend on-site family therapy.¹⁹

The Division's original denial stated:

The request for all five family members to travel for family therapy is denied because it is not supported by the request or additional documentation; therefore, the request is not medically necessary. The Department will pay for a service only if that service is medically necessary as determined by criteria established under 7 AAC 105 – 7 AAC 160 or by the standards of practice applicable to the provider. 7 AC 1905.100(5)[sic].²⁰

The Division did not contact Mr. J regarding the denial, nor seek additional information from No Name.²¹

On September 5, 2014, the Division issued a corrected notice of denial of request for travel authorization. The new notice corrected a typo, added additional reasons for the denial, and supplemented the legal authority. It stated in relevant part:

The request for all five family members to travel for on-site family therapy is denied because it is not supported by the request or additional documentation; therefore, the request is not medically necessary. The Department will pay for a service only if that service is medically necessary as determined by criteria established under 7 AAC 105 – 7 AAC 160 or by the standards of practice applicable to the provider, specifically 7 AAC 140.400 through 7 AAC 140.415.

Based on 7 AAC 105.100(5) and 7 AAC 105.130, Alaska Medicaid will reimburse for on-site family therapy once every 90 days if justified by medical necessity.

- 1) Your request to travel for on-site family therapy in July falls outside the 90 day parameter as Medicaid paid for two family members to attend on-site family therapy in May. Therefore travel is denied for July.
- 2) Request for travel for on-site family visitation to occur monthly is not a covered service.
- 3) Alaska Medicaid may cover one family member to travel every 90 days for on-site family therapy. In rare circumstances, Alaska Medicaid may authorize a second family member to also travel for on-site family

¹⁸ Ex. C, p. 2.

¹⁹ The record contains no evidence that family therapy has been denied.

²⁰ Ex. D (capitalization in original omitted).

²¹ J testimony.

therapy. Your request to travel for on-site family therapy for five family members is denied.²²

The corrected notice was the first mention of the 90-day, one family member parameters.

At the hearing, Reta Sullivan, a Licensed Clinical Social Worker and former therapist, testified that the travel request was primarily denied because it was for five family members and the Division had already approved travel for family therapy within the prior 90 days.²³ Ms. Sullivan understood the prior authorization was for the July trip, but also understood that the letter and supporting documentation was recommending monthly on-site visits for the family.²⁴

The Division makes occasional exceptions to the one-person rule and did so in B's case when it authorized Ms. N's and Ms. U's travel in May.²⁵ To Ms. Sullivan's knowledge, the Division has never approved travel for more than two people for out of state, on-site family therapy. The Division also makes exceptions to the 90-day guideline.²⁶

The 90-day and one-person on-site family travel guidelines have been used by the Division since at least 2005.²⁷ These guidelines are found in the *Alaska Medical Assistance Provider Billing Manual, Inpatient Psychiatric Hospital and RPTC Services, Policies and Procedures*.²⁸ This specific billing manual is not adopted by regulation.²⁹

Ms. Sullivan also denied the travel request because the preauthorization request lacked documentation of possible alternatives, notably Skype or telephone sessions.³⁰ Additionally, the Division believes the travel request for five family members is

²² Ex. E (capitalization and bold in original omitted).

²³ Sullivan testimony.

²⁴ Sullivan testimony.

²⁵ Sullivan testimony.

²⁶ Sullivan testimony. It appears the Division previously relaxed the 90-day guideline in B's case. Ms. N's travel was approved to escort B down in late January. Ms. U's travel in March was covered, and both parents' travel was approved in May. Because the record did not contain the specific travel dates, the days between visits is unclear. What is clear is that there were fewer than 90 days between the end of January and any day in March. It is also likely that there were fewer than a 90 days between the March and May trips.

²⁷ Sullivan testimony. Ms. Sullivan began working for the Division in 2005. Ex. F, p. 21, contains a version of the 90-day and one-family member rule revised in 2005.

²⁸ http://manuals.medicaidalaska.com/inpatient_psych_rptc/inpatient_psych_rptc.htm

²⁹ Division stipulation. 7 AAC 140.405(g) states that prior authorization will be issued in accordance with the department's *Behavioral Health Inpatient Psychiatric Review Provider Manual* adopted by reference in 7 AAC 160.900(d)(19). The Division stipulated that the manual adopted by regulation is not the same as the currently published billing manuals or other provider manuals included in Ex. F 19 - 21. The Department's *Behavioral Health Inpatient Psychiatric Review Provider Manual* does not contain rules regarding travel for on-site family therapy.

³⁰ Sullivan testimony. Skype provides free video calls and is available on smart phones or computers.

excessive.³¹ The Division does not challenge the medical necessity of family therapy.³² However, the Division does dispute the medical necessity of on-site family therapy for five people at one time.³³ The Division regularly authorizes a trial home visit for children residing in RPTCs.³⁴ The Division would authorize travel for B, and possibly a therapist, to return to No Name for a trial home visit, for family therapy and community support work to be engaged before B's discharge from No Name.³⁵

Mr. J also submitted a travel authorization request for a parent and Z, the sibling B has the most issues to work through with, to travel for on-site family therapy just prior to hearing.³⁶ The request had yet to come before the Division.

B. Visits and therapies

Ms. N escorted B to No Name in January.³⁷ Ms. U visited and attended therapy sessions with B in March. Both parents visited B and attended therapy sessions in May.³⁸ B has weekly therapeutic phone calls with his parents.³⁹ His siblings do not participate in the telephonic therapy sessions.⁴⁰ There have been two FaceTime visits, each occurring when one of his parents was onsite at No Name.⁴¹ Two or three Skype sessions were attempted early on, but there were connectivity issues.⁴² Family therapy via Skype or other video conferencing has not been attempted since.⁴³

Mr. J supports Skype sessions and believes they should be incorporated, but feels that face to face, in-person family therapy is most beneficial. Mr. J testified that B needs to practice being with his family safely and effectively. The sharing and "in the moment" type processing that occurs during in person family therapy is very valuable.⁴⁴

³¹ Division argument.

³² Division argument.

³³ Sullivan testimony.

³⁴ Sullivan testimony.

³⁵ Sullivan testimony.

³⁶ J testimony.

³⁷ J testimony.

³⁸ J testimony.

³⁹ Ex. F, p. 3. The phone therapy may be with one or both of B's parents.

⁴⁰ J testimony.

⁴¹ N testimony. FaceTime is an Apple service that enables video calls between Apple products, including Macs, iPads, and iPhones.

⁴² N testimony.

⁴³ N testimony.

⁴⁴ J testimony.

After the Division denied the family’s travel authorization, Ms. N and Ms. U decided to spend their own funds in order to engage in on-site family therapy with B and his siblings. The family flew roundtrip to Seattle (\$1,225), rented a vehicle (\$910), drove to No Name, and stayed in a rented house (\$804) from August 1 – 8, 2014.⁴⁵ The family requests reimbursement for airfare, vehicle rental, and accommodation.⁴⁶

The family flew to Seattle because it was more cost effective than flying to No Name. They rented a house because No Name’s apartment is not large enough to accommodate the whole family.⁴⁷ B stayed overnight with the family in the rental house all but one night during the stay.⁴⁸ While onsite, the family attended several hours of family therapy each day, participated in art projects, and practiced sharing and other positive family behaviors. The family experienced breakthrough moments during the course of on-site family therapy.⁴⁹

When the Division approves travel to No Name, airfare is provided from No Name to No Name, Oregon.⁵⁰ The Division’s practice is to not approve coverage for rental cars.⁵¹ The Division does not authorize accommodation unless it is through an approved Medicaid provider, prior authorization is granted, and the recipient stays at the accommodation.⁵²

III. Discussion

The sole issue here is whether the Division correctly denied prior authorization for five family members to travel for on-site family therapy from July 21 – 24, 2014. B has the burden of proof, by a preponderance of the evidence, to show that the denial was incorrect.⁵³

Medicaid provides medical assistance to individuals whose income and resources are insufficient to meet the cost of necessary medical services.⁵⁴ Medicaid plans must ensure necessary transportation for recipients to and from providers.⁵⁵ Nonemergency travel is not

⁴⁵ Ex. 1- 7.
⁴⁶ N-U argument.
⁴⁷ J testimony; N testimony.
⁴⁸ N testimony.
⁴⁹ J testimony; N testimony.
⁵⁰ N testimony.
⁵¹ Sullivan testimony.
⁵² Sullivan testimony.
⁵³ 2 AAC 64.290(e); 7 AAC 49.135.
⁵⁴ 42 U.S.C. § 1396 *et. seq.*
⁵⁵ 42 C.F.R. § 431.53(a).

covered unless the department issues prior authorization.⁵⁶ By regulation, the department is to consider the service’s medical necessity, clinical effectiveness, cost-effectiveness, and likelihood of adverse effects, as well as service-specific requirements when determining whether to grant prior authorization.⁵⁷ The department may place minimum or maximum quantities on a service or require other services before the recipient receives the requested service to maintain the financial integrity of the department and the Medicaid program.⁵⁸

A. The Division cannot rely on a non-adopted provider billing manual as an absolute rule to deny travel authorization.

The Division’s original notice denied travel for all five family members because it determined that the request or additional documentation did not establish the travel was medically necessary.⁵⁹ The Division’s corrected notice, issued in September 2014, again denied travel for all five family members based on lack of medical necessity. The notice added the following additional justification for the denial: 1) the travel was outside the 90 day parameter, because two family members were approved in May; 2) request for monthly visitation is not covered; and 3) one, possibly two in rare circumstances, family members may be authorized to travel for on-site family therapy.⁶⁰ The corrected notice cited 7 AAC 140.400 – 140.415 (the RPTC regulations), 7 AAC 105.100(5), and 7 AAC 105.130 as support for its decision.⁶¹

The 90-day and one-person rules are published in provider billing manuals and the Medicaid travel manual.⁶² While the *Alaska Medical Assistance Provider Billing Manual, Inpatient Psychiatric Hospital and RPTC Services, Policies and Procedures* is available online and contains the 90-day and one-family-member travel rules, it is not adopted by regulation.⁶³ The department’s *Behavioral Health Inpatient Psychiatric Review Provider*

⁵⁶ 7 AAC 105.130(a).

⁵⁷ 7 AAC 105.130(c).

⁵⁸ 7 AAC 105.130(c).

⁵⁹ Ex. D.

⁶⁰ Ex. E.

⁶¹ Ex. E.

⁶² Sullivan testimony;

⁶³ Stipulation.

Manual is adopted by reference in the RPTC, but the adopted manual does not contain the 90-day or one-person rule for on-site family therapy.⁶⁴

A manual or policy that is not adopted by regulation or statute lacks the force of law.⁶⁵ The Division may take a course of action that is consistent with the manual and its statutory authority, and may use it as guidance, but it may not rely solely upon unadopted policies to deny the travel request.⁶⁶ Therefore, we must examine whether the Division's denial was appropriate by applying the facts to the rules that have been adopted by regulation.

B. The Medicaid regulations support the Division's denial.

1. *The prior authorization regulations support the denial.*

The issue is whether the Division must authorize travel for five family members' on-site family therapy. As discussed below, the record does not establish that the prior authorization regulation required the Division to authorize travel for all five family members at one time.

In determining whether to grant a prior authorization, the department must consider factors that include medical necessity, clinical effectiveness, and cost effectiveness.⁶⁷ The department may also require that other services be tried before authorization of the requested service, as necessary to maintain the financial integrity of the department and the Medicaid program.⁶⁸ Likewise, the department may place minimums and maximums on the quantities of an approved service based on financial considerations.⁶⁹

While medical necessity of services is the touchstone of the reasonableness of a state's Medicaid plan, it is not defined in federal regulation or Alaska Medicaid

⁶⁴ <http://www.qualishealth.org/sites/default/files/AK-Behavioral-Health-Provider-Manual-current.pdf>. The online, currently available version is not the same version as is adopted in regulation. However, because there is no evidence that the 90-day or one-person rule was included in any earlier versions, this distinction is not relevant.

⁶⁵ See *Kenai Peninsula Fisherman's Coop. Ass'n, Inc. v. State*, 628 P.2d 897, 905 (Alaska 1981); *Reichmann v. State of Alaska Dep't of Natural Resources*, 917 P.2d 1197 (Alaska 1996).

⁶⁶ See *In re: Mike Tauriainen*, OAH Nos. 04-0239-AEL and 04-0240-AEL (OAH, June 2006), available <http://aws.state.ak.us/officeofadminhearings/Documents/AEL/AEL040239.pdf>. (citing *Jerrel v. State, Department of Natural Resources*, 999 P.2d 138 (Alaska 2000); *Gilbert v. State, Department of Fish and Game, Board of Fisheries*, 803 P.2d 391, 397 (Alaska 1990); *Kenai Peninsula Fisherman's Coop. v. State*. In *Gilbert and Kenai Peninsula*, the court affirmed agency action consistent with an invalid regulation that was authorized by law and the facts of the particular case.)

⁶⁷ 7 AAC 105.130(c).

⁶⁸ 7 AAC 105.130(c)(3).

⁶⁹ *Id.* This does not mean that the department may create hard-and-fast rules setting maxima without adopting them by regulation. Such rules would run afoul of the principle in cases such as *Noey v. Dep't of Environmental Conservation*, 737 P.2d 796, 805 (Alaska 1987). However, maxima may be set as appropriate in particular cases.

regulations.⁷⁰ The medical necessity of family therapy itself is not in question here. The Division agrees family therapy is necessary. In this case, medical necessity relates to an authorization for five family members' travel to onsite family therapy at one time, as opposed to the medical necessity of full family therapy itself.

Mr. J asserts that on-site family therapy with the entire family was necessary. Ms. Sullivan countered that telephonic or video therapy is a viable substitute. Mr. J disagreed. He asserts that on-site monthly therapy visits are critical even if telephone or video therapy were regularly used. While both hold master's degrees and both are therapists, Mr. J's treating therapist opinion is given greater deference.⁷¹ Even granting this deference, however, Mr. J's testimony was not so persuasive as to establish the medical necessity of on-site family therapy for five persons traveling without first engaging full family therapy via these available and inexpensive alternatives. Additionally, on-site therapy with individual siblings had yet to be attempted.⁷²

There is little doubt, in light of Mr. J's testimony, that face to face family therapy sessions are the preferred ideal and likely have greater effectiveness. One can accept Mr. J's basic thrust that more in-person sessions with five people present would be more efficacious, and yet still recognize the Division's refusal to approve this as a first resort as a common-sense, reasonable exercise of the department's limit-setting authority in dispensing limited resources.

In terms of alternatives, the record demonstrates that family therapy with the siblings via phone, Skype, or FaceTime was not provided in the first six months of B's stay at No Name, even though B's ISSP and Mr. J's testimony emphasized the importance of sibling therapy. Y and Z's therapists did not attempt to engage B in family therapy sessions, via phone or Skype.⁷³ The record shows successful use of FaceTime early on in B's stay, with no later attempts.

⁷⁰ See *In re: H.N.*, OAH No. 13-0067-MDS (OAH, April 2013), available <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/TA/MDS130067.pdf>. Regulations defining medical necessity did exist, but were repealed in 2010. The cases defining medical necessity typically address services and not specifically travel for services. The record did not contain, and this ALJ did not find, Alaska case law specifically addressing the situation at hand- authorization for a family of five to travel out of state for on-site family therapy.

⁷¹ *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).

⁷² The Division's decision whether to authorize Z and a parent to travel had not been made at the start of the hearing.

⁷³ N testimony.

Ms. Sullivan testified credibly that telephonic or Skype sessions are regularly and successfully used in Alaska. The Division may reasonably require Skype or FaceTime therapies with the entire family before considering approval for five family member's travel.⁷⁴ Therefore, because other reasonably available services were not attempted before requesting travel, the denial is appropriate.

The Division's denial is also supported by cost-effectiveness considerations. The request was for five family members' travel to Oregon. If approved, the Division would have authorized flights for five people from No Name to No Name, at about a \$3,080 cost.⁷⁵ Skype or telephonic sessions have a near zero cost. Weighing the cost of travel for five people against the cost of video therapy supports the Division's denial under cost-effectiveness considerations.

Mr. J testified that he never makes clinical recommendations based on funding constraints. It is certainly not Mr. J's job to write clinical recommendations that align with any billing manual or regulation. It is his job to recommend the ideal course of care for his patients. It is the Division's job to ensure that recommendations paid for by Medicaid fall within the scope of the regulations. It has done so here.

2. *The transportation regulations support the Division's denial.*

The Medicaid transportation regulations also support the travel denial. The regulations state that the department may approve transportation and accommodation services outside the recipient's community to obtain medically necessary services for the recipient if those services are not available in the recipient's community.⁷⁶ The "may" indicates a level of discretion in the department's decision-making authority.⁷⁷ The regulations also state the department will not pay for transportation or accommodation that

⁷⁴ It appears the Division would not approve five family members to travel at one time, even if Skype was used regularly. However, the facts would be different if the record contained evidence that B was engaging in regular telephonic or Skype sessions with the entire family with little positive therapeutic effect. That might cause the Division to approve more than one person to travel more often for family therapy.

⁷⁵ N testimony.

⁷⁶ 7 AAC 120.405(b)(1).

⁷⁷ The use of the word "may" rather than the directive "shall," indicates a discretionary power. *Frontier Saloon, Inc. v. Alcoholic Beverage Control Board*, 524 P.2d 657, 660 (Alaska 1974); *see also Gerber v. Juneau Bartlett Memorial Hospital*, 2 P.3d 74, 76 (Alaska 2000) (in contrast to the term "shall," the term "may" generally denotes permissive or discretionary authority and not a mandatory duty).

the department determines to be excessive or inappropriate for the distance traveled or inconsistent with the medical needs of the recipient.⁷⁸

The transportation regulations themselves do not appear to envision travel approval for five family members.⁷⁹ The regulation states that providers should request prior authorization for medically necessary transportation and accommodation on behalf of the recipient.⁸⁰ Although the regulations do not explicitly limit transportation to a recipient, neither do they provide for travel authorization for non-recipients. An eligible escort is the only expressly authorized non-recipient for whom travel may be approved.⁸¹ The Division, however, has applied the regulation to permit limited travel for other non-recipients. The absence of a regulatory process for approval of non-recipient travel provides some support for the Division's limit-setting and its characterization of the request as excessive.

C. Additional considerations.

B argued that the Division never asked for additional information, did not consider approval for a lesser number of family members to travel, and created a moving target as its denial basis. The Division did not seek additional information according to Ms. Sullivan because it is the provider who requests travel authorization and provides for its justification. Ms. Sullivan also stated that because the request was for all five family member's travel, she did not approve a lesser number, or really even consider it. On the other hand, the record contains no evidence of No Name staff contacting the Division to inquire what additional information was required or if a lesser number of family members could be approved. These issues neither bolster nor undermine the party's positions.

B also argues that the basis for denial was a moving target. According to B, the Division initially denied coverage citing lack of medical necessity, and later added the 90-day and one-person guidelines, as well as the video therapy issues. He asserts that the Division saw a request for five family members' travel, denied it because of cost concerns, and came up with justification after the fact. The Division counters that the target has always been related to failure to establish the medical necessity for all five family members' travel and its corrected notice contains the basis for its denial.

⁷⁸ 7 AAC 120.405(c)(1).

⁷⁹ The federal regulations only address recipient travel.

⁸⁰ 7 AAC 120.410(b).

⁸¹ 7 AAC 120.430.

B's is essentially a notice argument. A denial notice must include the reason for the denial and the statute, regulation, or policy relied upon for the denial.⁸² Both the initial notice and corrected notice cite medical necessity as a basis for denial. The corrected notice also cites 7 AAC 105.130, which requires the department to weigh the considerations discussed above. That regulation also grants the department the ability to set minimums or maximums on service or require additional services prior to considering the request before it. The inclusion of the 90-day and one-person policy rules, though not adopted by regulation, notify the family that the request was outside its normal scope of approval. Consequently, the notice met basic requirements because it identified the basis for denial and regulations relied upon.

IV. Conclusion

There is no doubt that B's needs are high. There is also agreement that family therapy is needed, and that on-site therapy is arguably most effective. However, the record also indicates that full family therapy, whether by telephone or video, was not engaged prior to the request. The denied request was for all family members and did not request travel approval for a lesser number if the full five were denied. The Division's decision strikes an appropriate balance between the recipient's medical needs of recipient, cost considerations, and program requirements.

This decision is based on the denial of five family members' travel in July 2014. It does not address a scenario where telephone or Skype family therapy with siblings was engaged for months, but proved ineffective. A different set of facts may lead to other outcomes. However, based on these facts, B has not established that the Division's travel denial for five family members was incorrect. The denial is upheld.⁸³

Dated this 21st day of November, 2014.

Signed

Bride Seifert
Administrative Law Judge

⁸² 7 AAC 49.070.

⁸³ B requested reimbursement for airfare, vehicle rental, and accommodation. Because this decision determines that the prior authorization denial was reasonable, it does not address the issue of whether vehicle rental and accommodation could be reimbursed through the hearing process, though ordinarily unavailable through department policy.

Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, under the authority of AS 44.64.060(e)(1).

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 16th day of December, 2014.

By: Signed
Name: Christopher M. Kennedy
Title: Administrative Law Judge

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