

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

In the Matter of)
)
G P)
_____)

OAH No. 14-0911-CCA
Agency No.

DECISION

I. Introduction

G P applied for, and was authorized to provide, in-home child care under the Child Care Assistance Program (CCAP). Ms. P provided child care for two families, both of which were authorized to receive child care under the program. Ms. P submitted billings to the Child Care Program Office (CCPO) for the child care provided, listing the children and families, and CCPO paid Ms. P for those billings. CCPO sought recovery of those payments because it later realized that the children Ms. P provided care for were not the children of the specified family listed on her child care provider application. Ms. P challenged the overpayment finding. An internal administrative review upheld CCPO’s initial overpayment determination.¹

Because Ms. P did not enter into a repayment plan, CCPO notified Ms. P she would be placed on the list of ineligible providers, ending her approval as a CCAP child care provider. Ms. P appealed her ineligible status and CCPO’s overpayment determination. Her case was referred to the Office of Administrative Hearings (OAH).

A hearing was held on June 20, 2014. Ms. P was assisted by her cousin, Mr. Mohamed Abe. Because Ms. P speaks Somali, with limited English, a Somali interpreter also participated. Ms. Terri Gagne represented CCPO.

At hearing CCPO raised the issue of timeliness for the very first time. CCPO argued that the scope of hearing was limited to whether Ms. P should be placed on the ineligible provider list because Ms. P did not appeal the administrative review upholding the overpayment determination within the 30-day timeframe,² and was now prevented from doing so. Ms. P testified at hearing that she did not see the decision upholding CCPO’s denial until she returned from a three-month stay in Africa. According to her testimony, Ms. P received both the notice of placement on the ineligible list and the notice upholding the overpayment determination after her

¹ Exhibit 8.

² 7 AAC 49.030(a).

return. While her testimony on this point was equivocal, she stated under oath she was in Washington preparing for her trip abroad when the notice upholding the overpayment determination would have been received. Ms. P could not have responded to the CCPO's notice upholding denial within 30 days because she was not receiving mail at that time: she was out of her home and on her way to an extended stay on another continent. Based on this evidence, Ms. P could not have filed a request for hearing within 30 days, and her overpayment determination hearing request is accepted.³

A ruling was made on the record that both the overpayment finding and placement on the ineligible provider list were issues for hearing. Ms. P's appeal request lists both placement and overpayment as the basis for her hearing request. Ms. P originally appealed the overpayment finding; CCPO prepared the position statement based on both issues;⁴ and Ms. P had no notice of CCPO's attempt to limit the scope of hearing.⁵ Ms. P testified under oath that she did not receive the notice upholding the overpayment until her return. The evidence supports granting Ms. P the opportunity to challenge both the overpayment and ineligibility issues.⁶

Because CCPO did not meet its burden of proving that the payments in question were actually overpayments per regulation, CCPO's overpayment determination and Ms. P's placement on the ineligible provider list are reversed.

II. Facts and Procedural Background

Ms. P applied for, and was approved to provide, in-home child care for the J family.⁷ The J family moved before Ms. P ever provided child care for them under CCAP.⁸ Ms. P provided child care for two other CCAP-approved families, the Ts and Bs.⁹ Ms. P billed for child care provided to the T and B children.¹⁰ Each billing specifically identified the children

³ 7 AAC 49.030(a).

⁴ Ms. Gagne inquired whether it was the ALJ's position that the agency could never request withdrawal of an issue after referral to OAH. That was not the ruling. Under the facts of this case, the evidence shows that the hearing request could not be made within 30 days. There have been, and likely will be, reasons for withdrawal of an entire case or specific issues within a case for failure to meet deadlines.

⁵ Oftentimes, when the Division challenges a hearing request based on timeliness, a hearing only on the issue of timeliness is scheduled either separately or prior to the hearing on the underlying issues. This process gives the appellant notice and an opportunity to prepare a response to the timeliness challenge.

⁶ CCPO maintains its objection that the scope of hearing should be limited to Ms. P's placement on the ineligible provider list.

⁷ Ex. 1-1.15; Ex. 2-2.1.

⁸ P testimony. Ms. P explained that she provided 10 days of child care for the J family, but it was not under CCAP.

⁹ Exhibit 3 – 3.21; Ex. 4 – 4.1; Ex. 12.2; P testimony.

¹⁰ Ex. 3-3.21.

cared for and the name of the approved parent.¹¹ CCPO reviewed these billings and paid Ms. P for the provided child care.¹² CCPO later reviewed the billings and realized Ms. P's approval only listed the J family. CCPO then determined that the funds Ms. P received for child care provided to the T and B families for September 2012 through March 2013 were overpayments.¹³

In October 2013, CCPO notified Ms. P that she was responsible for \$8,158 in overpayments because she was not approved to care for the T and B families.¹⁴ It notified her that, in order to satisfy her overpayment, CCPO would deduct \$400 per month from her submitted billings from December 2013 to July 2014 and end with a \$158 deduction in August 2015.¹⁵ On October 30, 2013, Ms. P submitted a request for an internal administrative review.¹⁶

On November 20, 2013, CCPO sent Ms. P notice upholding the overpayment determination.¹⁷ The notice states that Ms. P failed to report changes to CCPO regarding the families to which she was providing care.¹⁸ It notes that Ms. P was entered into the eligible provider database because she was approved to provide care for the J children.¹⁹ CCPO staff did not realize that Ms. P was only approved to provide child care for the J children.²⁰ CCPO upheld the overpayment finding because Ms. P provided care for the B and T children without CCPO approval.²¹

On January 30, 2014, CCPO sent Ms. P a child care assistance debarment warning because she failed to set up a repayment plan.²² On May 6, 2014, CCPO sent Ms. P a "child care assistance provider - end of approval status" notice.²³ It notified Ms. P that she was placed on the list of ineligible families effective March 31, 2014, and that she is no longer eligible to participate in CCAP as a family or provider.²⁴

¹¹ Ex. 3-3.21.

¹² Ex. 3-3.21.

¹³ Position statement; Gagne testimony.

¹⁴ Ex. 5; Ex. 6.1.

¹⁵ Ex. 5; Ex. 6.1.

¹⁶ Ex. 7; Ex. 8-8.4. The record does not contain Ms. P's request for review, but does contain CCPO's response, which quotes Ms. P's request for review.

¹⁷ Ex. 8-8.2. The record at Ex. 8.4 contains a receipt for certified mail. The receipt has no date and there is no record of Ms. P receiving the notice.

¹⁸ Ex. 8.2.

¹⁹ Ex. 8.2.

²⁰ Position statement; Gagne testimony.

²¹ Ex. 8.2.

²² Ex. 9.1.

²³ Ex. 11.

²⁴ Ex. 11.

Ms. P left Alaska at the end of November 2013 and returned in March 2014.²⁵ She did not receive the notice upholding CCPO's overpayment determination until she returned.²⁶ On May 12, 2014, Ms. P appealed both the overpayment determination and her placement on the ineligible provider list.²⁷ On May 22, 2014, CCPO, through its internal administrative review process, upheld its decision to place Ms. P on the ineligible provider list.²⁸ On May 30, 2014, Ms. P appealed CCPO's administrative review.²⁹ The matter was referred to OAH on June 2, 2014.

III. Discussion

CCAP is authorized for the purpose of "providing day care for the children of low and moderate income families."³⁰ In general, the program is designed to help parents who need child care while they are working, seeking work, or attending school.³¹ CCAP regulations, found in Alaska Administrative Code 7 AAC 41, outline program guidelines and provider and family responsibilities. Families applying for or receiving temporary assistance benefits may be coded "as eligible for PASS I or II."³² Families must have a provider identified before their case manager can send CCPO a child care request.³³ When a child care request is received, CCPO staff checks the provider module to identify that the provider is approved for the period of time being requested for care, and that their hours of operation overlap with families' care needs.³⁴ For in-home providers like Ms. P, CCPO verifies that the children the provider was approved to care for are the children listed on the child care request.³⁵

Providers must apply for, and be authorized to provide, child care.³⁶ Providers may be authorized to provide care in a variety of settings, including licensed child care facilities, day

²⁵ P testimony.

²⁶ P testimony.

²⁷ Ex. 12.

²⁸ Ex. 13. The administrative review did not address the overpayment issue.

²⁹ Ex. 14.3.

³⁰ 7 AAC 41.012. CCAP is authorized under AS 47.25 and AS 47.27. CCAP calls the program PASS, parents achieving self-sufficiency, and designates three categories of assistance, PASS I, II, or III.

³¹ 7 AAC 41.310.

³² 7 AAC 41.012; Gagne letter to OAH (June 24, 2014). At the end of the hearing CCPO was asked to research several program questions. The record was held open in order to accommodate its response.

³³ Gagne letter to OAH (June 24, 2014).

³⁴ Gagne letter to OAH (June 24, 2014).

³⁵ Gagne letter to OAH (June 24, 2014).

³⁶ 7 AAC 41.200.

camps, care outside the child's home, or care in the child's home.³⁷ Ms. P was approved as an in-home provider.³⁸

Under the Department's regulations, CCPO has the burden of proof because it is attempting to recoup monies already paid to Ms. P.³⁹ This case raises two questions. First, is Ms. P required to repay the child care payments CCPO issued, and for which she provided care? Second, should CCPO have placed Ms. P on the list of ineligible providers? The answer to both is no.

A. Ms. P is not required to reimburse CCPO for the child care payments.

CCPO does not dispute that Ms. P provided all of the billed for, and paid for, child care. Nor does CCPO argue that the children were not authorized to receive child care services. CCPO's position is that, because Ms. P's approval only listed the J family,⁴⁰ she was not approved to provide care for the B and T families.⁴¹ CCPO is correct; Ms. P's approval only lists the J family. However, for purposes of this decision, the question is whether CCPO was correct when it identified the payments to Ms. P as "overpayments of program benefits." The evidence shows this determination was inaccurate.

"Overpayment of program benefits occurs if a family or provider receives benefits it is not entitled to under AS 47.25.001 - 47.25.095 and this chapter."⁴² CCPO must therefore show that Ms. P received benefits she was not entitled to under CCAP statutes or regulations. It has not done so. The sole basis for CCPO's denial is that Ms. P did not seek amended authorization to provide child care for the T and B families. Nowhere in the regulations or statutes does it state that a provider of in-home child care must submit a new application, or seek updated authorization for each new family.

When asked where in the record CCPO finds support for its assertion that Ms. P was required to reapply for each new family, CCPO referenced Ms. P's in-home provider application⁴³ and the child care provider rates and responsibilities form.⁴⁴ The application states

³⁷ 7 AAC 41.990.

³⁸ Ex. 2.1; P testimony; Gagne testimony.

³⁹ 7 AAC 49.135. The burden is by a preponderance of the evidence. *See Z.O.*, OAH No. 13-0425-CCA (OAH 2013).

⁴⁰ Ex. 2.1.

⁴¹ Gagne testimony.

⁴² 7 AAC 41.420(a).

⁴³ Ex. 1.2; Ex. 1.4.

⁴⁴ Gagne testimony.

that the provider has the responsibility to report any changes in circumstance that might affect his or her eligibility to participate in the program, with examples given of a new provider address or phone number.⁴⁵ It also states that the provider understands that she is responsible for compliance with program rules and requirements and repayment of overpayments.⁴⁶ The rates and responsibilities form states that the provider understands that she must have a valid authorization before she can bill the state for services provided to CCAP families. It also states, “[C]harges that are not on the authorization are between the family and myself and cannot be billed to the state.”⁴⁷ Ms. P signed both forms. These statements alone do not identify the requirement for a new application or approval for each family.

CCPO also argues that Ms. P is required to reapply for each family, and was made aware of this because both the application and her approval state that in-home services are provided to a specific family.⁴⁸ When asked what her understanding of services provided in a specific family’s home was, Ms. P testified that no one really explained it to her. When pressed, she stated that she knew she had to apply, and that if approved, she could take care of kids and be responsible for their safety. She believed she was authorized to provide services to eligible families, not just the J family. CCPO’s assertion that “specific family” language equates to a clear rule requiring a separate approval for each family is persuasive, but not determinative.

CCPO asserts that the program requires reapplication or amended approval for each new family, but the regulations do not state that requirement. Because CCPO may only find an overpayment if Ms. P received benefits she was not entitled to under the CCAP statutes or regulations, it cannot rely on the program rule or policy requiring reapplication for each family as a basis for its overpayment finding.⁴⁹

CCPO’s overpayment finding is also suspect because it authorized the children for in-home child care service provided by Ms. P. Providers must have a valid authorization in order to bill CCPO.⁵⁰ “Child Care Authorization” means the written authorization regarding program assistance issued under 7 AC 41.340.⁵¹ 7 AAC 41.340, Child Care Authorization” states, in

⁴⁵ Ex. 1.2.

⁴⁶ Ex. 1.2.

⁴⁷ Ex. 1.2.

⁴⁸ Ex. 1.1; Ex. 2.0.

⁴⁹ Because the CCPO’s interpretation has not been adopted into regulation, it cannot be considered an adopted policy. It can only be considered on a case by case basis. *See e.g. Z.O.*, OAH No. 13-0425-CCA n. 91 (OAH 2013).

⁵⁰ 7 AAC 41.210(c)(5).

⁵¹ 7 AAC 41.990(12).

pertinent part:

(a) After the department or a designee determines a family is eligible to participate in the program, and that the provider selected by the family is an eligible provider, the department will or the designee shall issue to the family and the provider, a child care authorization that

(1) identifies the children for whom child care is authorized;

(2) identifies the provider selected by the family...

(b) If necessary to address a change in a participating family's circumstances, the department will or a designee shall issue to the family and the provider a new child care authorization under (a) of this section. In the new authorization, the department will or the designee shall state the period of time for which the authorization is in effect, but the department will not, and the designee may not extend the authorization beyond the last day of the family's current eligibility period.

Regulation states that a child care authorization is issued after the department or designee determines that both the family and provider are eligible.⁵² The record contains a CCPO print out showing that both the T and B families were approved for CCPO child care.⁵³ The record also contains a “child care authorization” for the B family identifying Ms. P as the provider.⁵⁴ While Ms. P was not authorized to provide child care for the Bs and Ts, the families were authorized for child care from Ms. P.⁵⁵

Lastly, the facts of the case simply do not support CCPO’s overpayment determination. CCPO made an overpayment determination because Ms. P did not reapply or seek to amend her application to add the T and B children. Responsibility for that error lies with both CCPO and Ms. P. Although the reapplication requirement is not expressly stated in regulation, statute, or the record, both the application and approval state in-home child care is for a specific family. If Ms. P did not know what this meant, she should have inquired. Providers have a responsibility to comply with program rules.

On the other hand, CCPO or its designee has an obligation to grant authorizations to families and providers before care begins, request new authorization for care when a family

⁵² 7 AAC 41.340(a).

⁵³ Ex. 4.1-4.2.

⁵⁴ Ex. 12.2. At hearing, CCPO argued that the “child care authorization” form does not actually authorize child care, but simply lists the family, children, and the provider. This is inconsistent with CCPO testimony during a prior child care assistance case (*See* OAH No. 14-0232-CCA, pending final decision). In that case, CCPO denied payments to an approved provider because the family did not have authorization for the child care. The proposed OAH decision upholds CCPO’s denial.

⁵⁵ Ex. 12.2. The B family’s authorization lists Ms. P. However, CCPO did not suggest or present any evidence that the Ts did not have authorization listing Ms. P.

selects a new provider, and verify and approve billings.⁵⁶ Errors were apparently made in each of these categories, yet CCPO argues that it is required to seek reimbursement from Ms. P.⁵⁷

CCPO paid Ms. P because she was listed in the system as an eligible provider and the T and B families were eligible for child care.⁵⁸ CCPO did not realize until October 2013 that Ms. P was only authorized to provide care for the J family.⁵⁹ CCPO stated that the question is not whether the children were eligible, but only whether Ms. P was eligible to provide care for those children.

When asked what happens when an in-home provider submits a billing identifying children they are not approved to care for, CCPO responded as follows:

When a billing is received and during the information check noted above it is identified the provider is not approved to care for the children noted, the payment is not authorized and the family is notified. Once notified, and if the provider has not already done so, they must report a change to the agency to have the children they are billing for added to their approved children. The new children will only be added if the provider has not already exceeded their maximum capacity.⁶⁰

It appears from this response that a provider may be given the opportunity to correct his or her failure to seek approval for a new family. Ms. P was not given this opportunity. CCPO indicated that had Ms. P sought approval to add additional children, the process may well have been streamlined because she was already approved and met the necessary requirements.⁶¹

Ms. P was an approved CCAP in-home child care provider, with English as a second language, who rendered child care services to eligible children, whose families reported Ms. P as

⁵⁶ Gagne letter; <http://dpaweb.hss.state.ak.us/main/manual/ChildCare/CCPASSIMAN.PDF>.

⁵⁷ Gagne testimony; Gagne letter. Ms. Gagne asserts that CCPO must seek repayment regardless of who committed the error. This is not clear from the record. There is no authorizing statute that requires repayment. 7 AAC 41.420(d) requires the department to take action to recover overpayments if the provider or family does not comply with a repayment plan established under (c). 7 AAC 41.420(c) requires the department or designee to consult with the provider to develop a repayment plan. The record does not contain evidence of any consultation. Nothing indicates that Ms. P agreed to a repayment plan. It also appears that CCPO has discretion to waive recoupment. *See U.N.*, OAH No. 13-0426-CCA at 3 (OAH 2013)(holding CCAP has authority to waive recoupment in whole or in part).

⁵⁸ Gagne testimony.

⁵⁹ CCPO's position statement; Gagne testimony.

⁶⁰ Gagne letter to OAH (June 24, 2014).

When asked at hearing if a provider may be retroactively authorized to care for additional families, CCPO did not believe so because the regulations state a provider may not bill without approval. This appears to contradict the June 24, 2014 letter.

Nothing in the record indicates that Ms. P exceeded her maximum capacity or that there were any irregularities with the billing.

⁶¹ Gagne testimony.

their provider, and CCPO granted authorization for the care and paid for months on end, after verifying approval for both children and provider. After careful consideration, the record does not support CCPO's decision that Ms. P received benefits she was not entitled to under CCAP statutes and regulations. Its overpayment determination is reversed.

B. Ms. P should not be placed on the ineligible provider list.

CCPO placed Ms. P on the ineligible provider list because she did not establish a repayment plan.⁶² 7 AAC 41.420(d) authorizes CCPO to place a family that does not comply with the terms of a repayment plan developed under (c) on an ineligible family list. Ms. P never established a repayment plan with CCPO and challenged the overpayment finding. Because CCPO's overpayment determination is reversed, there is no basis for Ms. P to be on the ineligible family list.

IV. Conclusion

Ms. P provided child care to families for which she was not specifically approved. However, because the payments for the provided child care do not meet the definition of overpayment under regulation or statute, CCPO's overpayment determination is reversed. Because the overpayment finding is reversed, it cannot be used as a basis to place Ms. P on the ineligible provider list. Accordingly, Ms. P's placement on the ineligible family list is also reversed.

This decision is limited to the September 2012 through March 2103 billings, and does not control any future failings to comply with CCAP program requirements. Ms. P is now aware of the program requirements and her responsibility to comply with them.

DATED this 25th of July, 2014.

By: Signed
Bride Seifert
Administrative Law Judge

⁶² Ex. 9.1.

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 11th day of August, 2014.

By: *Signed*
Name: Bride Seifert
Title/Division: ALJ/OAH

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