

## Final Agency Decision

B. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows and adopts the proposed decision as revised:

The new copay amount is \$236.00, using 70 hours per week in the calculation. Mr. D submitted 60-80 hours worked per week in his application. The average of 70 hours is the appropriate number to use in the calculation.

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 21 day of April, 2017.

By: Signed  
Douglas Jones  
Medicaid Program Integrity Manager  
Department of Health and Social Services

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

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

In the Matter of	)	
	)	
D D	)	OAH No. 17-0106-CCA
_____	)	Agency No.

**DECISION**

**I. Introduction**

D D applied for child care assistance under the Child Care Assistance Program administered under the Division of Public Assistance (Division). The Division found Mr. D eligible for child care assistance and determined the family contribution Mr. D was obligated to pay toward the child care services he was receiving based on his monthly self-employment income, as determined by the Division. Mr. D requested a fair hearing seeking to have his monthly income recalculated.

Because the Division did not rely upon the best estimate of Mr. D’s monthly self-employment income and overestimated his income, thereby resulting in a higher family contribution for Mr. D, the Division is REVERSED. As discussed below, the new copay is \$150.00.

**II. Facts**

Mr. D is the father of N, who is approximately 18 months old.<sup>1</sup> Mr. D applied for child care assistance on November 10, 2016.<sup>2</sup> Mr. D is self-employed and stated in his application that he works 60-80 hours per week beginning on November 1, 2015.<sup>3</sup> He reported his work schedule as “M-Sun. 24/7.”<sup>4</sup> In support of his application, Mr. D submitted Self-Employment Income / Deduction Worksheets for the months of August, September and October 2016.<sup>5</sup> Mr. D’s worksheets report the following self-employment income and deductions:

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<sup>1</sup> Ex. 2.5  
<sup>2</sup> Ex. 2.5-2.13.  
<sup>3</sup> Ex. 2.6.  
<sup>4</sup> Ex. 2.6.  
<sup>5</sup> Ex. 2.11-2.13.

<b>Month</b>	<b>Income</b>	<b>Deductions</b>	<b>Net</b>
August 2016	\$1,769.98	\$1,603.00	\$166.98
September 2016	\$0.00	\$585.00	(\$585.00)
October 2016	\$977.03	\$2,802.00	(\$1,824.97)

This information shows a negative average monthly income for this period of approximately minus \$747.00 for Mr. D.<sup>6</sup>

Mr. D was interviewed by a representative of the Division.<sup>7</sup> During the interview, Mr. D reported his work schedule as Sunday to Saturday, 9:30 a.m. to 10:00 p.m.<sup>8</sup>

The Division determined that Mr. D was eligible for child care assistance and issued its approval decision on January 18, 2017.<sup>9</sup> The Division determined that Mr. D had a two-person household (himself and N) and a countable monthly income of \$3,659 for the period November 2016 through April 2017.<sup>10</sup> The Division’s approval letter refers Mr. D to “the enclosed worksheet(s) for details on how your family’s monthly income was determined.”<sup>11</sup> This worksheet is in the record and reports a Total Income, Minimum Wage Test for Mr. D of \$3,658.63.<sup>12</sup> However, additional insight into the Division’s calculation of Mr. D’s income can be gleaned from the Official Family Case Note in the record. The case note reflects that the Division determined Mr. D’s monthly regular time income “based on a schedule of (172.00 hours per week x 4.3) x \$9.75/hour = \$1667.00/month.”<sup>13</sup> The Division determined Mr. D’s monthly overtime income as “135.45 hrs. X \$14.63 (Minimum overtime wage) = \$1981.00.”<sup>14</sup> Adding these two figures, the Division arrived at Mr. D’s total countable monthly income of \$3,659.00.<sup>15</sup>

In its approval decision, the Division explained to Mr. D that he was responsible for paying to his day care provider a monthly family contribution or copay to help pay for the child care services he received.<sup>16</sup> Based on the countable monthly income it determined for Mr. D (\$3,659), the Division determined that Mr. D’s monthly copay was \$363.00 for the period

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<sup>6</sup> Ex. 2.11-2.13.

<sup>7</sup> Ex. 2-2.4.

<sup>8</sup> Ex. 2.3.

<sup>9</sup> Ex. 3.

<sup>10</sup> Ex. 3-3.1.

<sup>11</sup> Ex. 3.1.

<sup>12</sup> Ex. 11.

<sup>13</sup> Ex. 2.1.

<sup>14</sup> Ex. 2.1. The Division determined Mr. D’s monthly overtime hours as: “4.5 hrs (per day) X 7 days = 31.50 hrs X 4.3 = 135.45 hrs per month.” Ex. 2.3.

<sup>15</sup> Ex. 3.1. However, the correct sum of these figures is \$3,648.00.

<sup>16</sup> Ex. 3. See 7 AAC 41.330.

November 2016 to April 2017.<sup>17</sup> The Division derived this amount from the schedule in the Division’s Family Income and Contribution Schedule Effective November 1, 2010, which sets copays based on household size and income.<sup>18</sup>

Mr. D administratively appealed the Division’s child care decision on January 20, 2017.<sup>19</sup> A hearing was held on Mr. D’s appeal on March 9, 2017.

At the hearing, Mr. D explained that he wanted to see his monthly income recalculated because he misinterpreted the request for information concerning his work hours.<sup>20</sup> He explained that he did not actually work the hours reported, and that these were instead the hours he makes himself available to potential clients seeking his services.<sup>21</sup> Mr. D explained that if his actual time working was used for the minimum wage calculation, his monthly income would be reduced, thereby resulting in a lower copay amount.<sup>22</sup> In fact, as the Division representative noted, Mr. D’s copay has been re-determined in the amount of \$186.00 beginning February 1, 2017.<sup>23</sup> The Division argued that the Division cannot revisit past months, and that the determination of monthly income is made exclusively on a prospective basis.<sup>24</sup> In support, the Division’s representative cited the Division’s regulations, as well as the practical limitations that the Division would encounter if it was constantly going back and re-determining the income of its many clients.<sup>25</sup>

### **III. Discussion**

The Child Care Assistance Program is authorized under AS 47.25 and intended to “provid[e] day care for the children of low and moderate income families.”<sup>26</sup> In general, the program is designed to help parents who need child care while they are working, seeking work, or attending school.<sup>27</sup> Mr. D’s eligible activity is work.<sup>28</sup> The issue on appeal is whether the Division accurately determined his monthly income and resulting monthly copay.

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<sup>17</sup> Ex. 3-3.1; Ex. 6. November 2016’s copay was prorated to \$254.10. Ex. 3.

<sup>18</sup> Ex. 6. *See* 7 AAC 41.335.

<sup>19</sup> Ex. 4. Mr. D’s appeal was first administratively reviewed by the Child Care Program Office, which affirmed. Ex. 5.1.

<sup>20</sup> D.

<sup>21</sup> D.

<sup>22</sup> D.

<sup>23</sup> Dial. Thus, this appeal concerns Mr. D’s copays for the three months of November 2016 to January 2017.

<sup>24</sup> Dial.

<sup>25</sup> Dial.

<sup>26</sup> AS 47.25.001(a)(1).

<sup>27</sup> 7 AAC 41.310.

<sup>28</sup> Ex. 2.3.

CCAP determines an applicant's monthly income by:

totaling

(A) the monthly gross earned income of each parent paid in cash or in kind as wages, salary, tips, bonuses, or commissions, and earned in exchange for the performance of services as an employee;

(B) *the greater of*

(i) the self-employment income of each parent, determined in accordance with 7 AAC 45.445 and 7 AAC 45.450; or

(ii) if the time engaged in a self-employment activity exceeds three months, *the amount equal to the number of hours in the parent's proposed work schedule attributable to the self-employment activity, multiplied by the minimum wage established under AS 23.10.065. . . .* [<sup>29</sup>]

Here, Mr. D did not report any monthly income from wages, salary, etc. Because Mr. D is self-employed, the Division relied upon subsection (B) quoted above to calculate his monthly income. The Division correctly calculated that amount under subsection (B)(ii) because Mr. D's self-employment *income* is less than the *minimum wage* test. Mr. D's reported average monthly self-employment income was approximately minus \$747.00.<sup>30</sup>

The Division is also correct that an applicant's monthly income is determined on a prospective basis. For example, the Division's regulations provide that the agency "will or the designee shall make a *best estimate* of the average monthly income a family receives or is *expected* to receive during each month for which eligibility is being determined."<sup>31</sup> Estimates and expectations are necessarily forward-looking. This same regulation also states that "[a]ny one of the following methods may be used to calculate *prospective* average monthly income. . . ."<sup>32</sup> Further, there is no provision in the Division's regulations for recalculating monthly income for a prior period based on subsequently developed information.<sup>33</sup>

The Division erred, however, in including *overtime* in its calculation of Mr. D's monthly income. The Division's regulations state that self-employment income shall be counted as "the amount equal to the number of hours in the parent's proposed work schedule attributable to the self-employment activity, *multiplied by the minimum wage established under AS 23.10.065.*"<sup>34</sup> The payment of overtime by employers is covered by AS 23.10.060, not AS 23.10.065. The

<sup>29</sup> 7 AAC 41.325(a)(1) (emphasis added).

<sup>30</sup> Ex. 2.11-2.13.

<sup>31</sup> 7 AAC 41.325(b) (emphasis added).

<sup>32</sup> 7 AAC 41.325(b) (emphasis added).

<sup>33</sup> See, e.g., 7 AAC 41.325, .330 and .335.

<sup>34</sup> 7 AAC 41.325(a)(1)(B)(ii) (emphasis added).

Division's regulation incorporates AS 23.10.065, establishing a minimum wage, not the entire Wage and Hour Act, AS 23.10.

In counting overtime in its calculation of Mr. D's monthly income, the Division evidently relied upon its Child Care Assistance Manual (Manual). The Manual states that "[w]hen using the minimum wage to calculate earnings overtime the regular hourly rate is multiplied by 1.5 for time engaged in the self-employment activity that is over 8 hours a day, or over 40 hours a week."<sup>35</sup> The Division's Self-Employment Income Worksheet also includes a line for overtime.<sup>36</sup> The Manual and worksheet, however, cannot be strictly applied to Mr. D because they have not been adopted into law as regulations. When an agency wants to enforce a standard, it must formally adopt that standard in a regulation. Merely writing the standard into a policy manual does not make the standard enforceable.<sup>37</sup> This is especially true where, as here, the manual goes beyond the standards in the Division's regulation.<sup>38</sup> Here, the Manual calls for the calculation of income in a manner not specified by the Division's regulation and that directly impacts the public.<sup>39</sup> Therefore, the hypothetical overtime wages attributed to Mr. D by the Division shall be excluded from the calculation of his income.

The Division further erred in that it did not make its "best estimate" of Mr. D's self-employment income.<sup>40</sup> The Division determined Mr. D's monthly regular time income "based on a schedule of (172.00 hours per week x 4.3) x \$9.75/hour = \$1667.00/month."<sup>41</sup> There are several problems with this calculation. First, the math does not add up. One hundred seventy-two multiplied by 4.3 multiplied by \$9.75 equals \$7,211.10, not \$1,667.00. Second, the estimate of 172 hours per week is arbitrary and cannot be applied to Mr. D. The Division evidently credited Mr. D's statement in his application that he works "24/7."<sup>42</sup> This statement is plainly an unreliable exaggeration as it is humanly impossible for a person to work twenty-four hours a day, seven days a week. For example, such a schedule would imply that Mr. D does not need to

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<sup>35</sup> Ex. 9.4.

<sup>36</sup> Ex. 11.

<sup>37</sup> *Kenai Pen. Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 908 (Alaska 1981) (holding comprehensive management policy for fisheries not adopted into regulation not enforceable).

<sup>38</sup> *Compare Messerli v. Dept. of Natural Resources*, 768 P. 2d 1112, 1118 (Alaska 1989) (holding agency manual not a regulation because it mainly recited statutory procedures).

<sup>39</sup> *State v. Nondalton Tribal Council*, 268 P. 3d 293, 300-01 (Alaska 2012) (explaining indicia of regulation include whether the policy implements, interprets, or makes specific the law enforced or administered by the agency and whether it affects the public or is used by the agency in dealing with the public).

<sup>40</sup> 7 AAC 41.325(b).

<sup>41</sup> Ex. 2.1.

<sup>42</sup> Ex. 2.6.

sleep.<sup>43</sup> Further, immediately preceding the “24/7” statement, Mr. D estimated his hours worked as “60-80.”<sup>44</sup> While still high, this information presents much more reliable evidence of his self-employment hours. Finally, using 172 hours per week – even setting aside the other problems just discussed – means the Division double-counted hours because the Division counted 24 hours a day, seven days a week and then added 4.5 hours per day, seven days a week of overtime.<sup>45</sup>

Because overtime cannot be counted, and because the Division’s 172 hour/week estimate cannot be relied upon, the best estimate of Mr. D’s monthly income is achieved by using the statement in his application that he works 60 hours a week.<sup>46</sup> Using this figure results in the following: 60 hours per week multiplied by 4.3 multiplied by \$9.75 equals \$2,515.5 in monthly income. This figure results in a copay, based on the Division’s schedule, of \$150.00.<sup>47</sup>

#### **IV. Conclusion**

The Division’s January 18, 2017, decision determining Mr. D’s copay is REVERSED. Mr. D’s copay is \$150 for the months of November 2016 through January 2017.

DATED: April 4, 2017.

By: Signed \_\_\_\_\_  
David J. Mayberry  
Administrative Law Judge

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

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<sup>43</sup> The estimate of 172 hours per week is also unreliable because 172 divided by seven (the days in a week) equals 24.57 hours, which obviously exceeds the number of hours in a day.

<sup>44</sup> Ex. 2.6.

<sup>45</sup> Ex. 2.1; Ex. 2.3.

<sup>46</sup> Ex. 2.6.

<sup>47</sup> Ex. 6.