

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

In the Matter of)
)
FAMILY CENTERED SERVICES OF) OAH No. 18-0946-MDA
ALASKA)
_____)

DECISION BY SUMMARY ADJUDICATION

I. Introduction

Family Centered Services of Alaska (FCSA) is a Medicaid provider that provided Mental Health Rehabilitation Services (MHRS) to three Medicaid recipients in 2011. The Department of Health and Social Services' Medicaid Program Integrity Unit (Program Integrity) notified FCSA in August 2016 that an audit of FCSA's Medicaid billings for 2011 revealed that it had been overpaid a total of \$17,798 for those MHRS services and was required to reimburse that amount to Medicaid. The underlying audit's claims were based upon a finding that FCSA was billing for MHRS services on the same days that another Medicaid provider was providing Residential Behavioral Rehabilitation Services (BRS) to the same recipients. FCSA requested reconsideration of the repayment requirement. Program Integrity denied reconsideration in August 2018 and notified FCSA that it was required to repay the \$17,798.

FCSA requested a hearing to challenge the repayment requirement. An evidentiary hearing was not held. Instead, the parties cross-moved for summary adjudication in their favor. After a review of the parties' pleadings and the record in this matter, Program Integrity's motion for summary adjudication is DENIED and FCSA's motion for summary adjudication is GRANTED. Accordingly, Program Integrity's requirement that FCSA reimburse Medicaid \$17,798¹ for the MHRS provided to the three Medicaid recipients in 2011 is REVERSED.

¹ In its briefing, FCSA raised the point that the audit's findings included days when the relevant Medicaid recipients were not receiving BRS from a separate provider, which meant that Program Integrity's repayment demand overstated the relevant amount by at least \$2,466. See FCSA's *Response to Program Integrity's Supplementation of Record on the Cross-Motions for Summary Adjudication* dated September 26, 2019, pp. 7 – 10. Program Integrity conceded this point and agreed to reduce its payment demand, but did not concede that the actual amount of the reduction was \$2,466: "Program Integrity has not had the opportunity to confirm there are exactly \$2,466.00 in overpayments related to BRS rendered by PHH BR0003 and therefor the revised overpayment total of \$15,332.00 is an estimate of what the revised overpayment total will be." See Program Integrity's *Reply to Appellant Family Centered Services of Alaska's Response to Record Supplement* dated November 15, 2019, fn. 14 at p. 4.

II. Facts

FCSA is a non-profit with offices in Fairbanks and Wasilla that is enrolled with Alaska Medicaid as a Community Behavioral Health Services provider. As part of its programs, it offers day treatment services, which consists in part of providing emotionally disturbed children their public education in FCSA's facility.² Three Medicaid recipients³ were referred to its program by the local school district in 2011.⁴

FCSA requested prior authorization from Alaska Medicaid to provide mental health rehabilitation services (MHRS), including day treatment services, to Recipient 1 for the time period of January 11 through May 31, 2011.⁵ FCSA requested prior authorization from Alaska Medicaid to provide MHRS to Recipient 2 for the time period of June 1 through August 31, 2011.⁶ An additional prior authorization request, which included a request for day treatment services, was submitted for Recipient 2 on August 1, 2011 for the time period of August 1 through December 31, 2011.⁷ FCSA requested prior authorization from Alaska Medicaid to provide MHRS and day treatment services to Recipient 3 for the time period of August 1 through December 31, 2011.⁸ Each of these prior authorization requests were approved by Alaska Medicaid.⁹

Alaska Medicaid paid FCSA for providing MHRS to Recipient 1 from January 31 through May 19, 2011.¹⁰ It also paid FCSA for providing MHRS to Recipient 2 from June 2, 2011 through August 23, 2011, and for providing MHRS to Recipient 3 from August 24 through August 30, 2011.¹¹

The Recipients were also receiving Residential Behavioral Rehabilitation Services (BRS) from Presbyterian Hospitality House (PHH) on the same days as they were receiving MHRS from FCSA.¹² Recipient 1 was placed at PHH on December 27, 2010.¹³ Recipient 2 was placed

² John Regitano May 8, 2019 Affidavit, para. 3 – 4.

³ In order to comply with confidentiality requirements, the recipients are identified as Recipients 1 through 3.
⁴ John Regitano May 8, 2019 Affidavit, para. 5.

⁵ Claudia Schwarz Affidavit dated July 30, 2019, Ex. 1, pp. 1 - 4.

⁶ Claudia Schwarz Affidavit dated July 30, 2019, Ex. 1, pp. 5 – 6.

⁷ Claudia Schwarz Affidavit dated July 30, 2019, Ex. 1, pp. 7 – 9.

⁸ Claudia Schwarz Affidavit dated July 30, 2019, Ex. 1, pp. 10 – 12.

⁹ Claudia Schwarz Affidavit dated July 30, 2019. In addition, counsel for Program Integrity stipulated that these prior authorization requests were approved during oral argument held on August 1, 2019.

¹⁰ Doug Jones July 29, 2019 Affidavit, para. 4 – 13; Agency Record (AR) AR 207 – 209.

¹¹ Doug Jones July 29, 2019 Affidavit, para. 5 – 20; AR 209.

¹² Doug Jones July 29, 2019 Affidavit; AR 207 – 209.

¹³ Ex. S, pp. 1 - 2

at PHH on or about November 29, 2010.¹⁴ Recipient 3 was placed at PHH on or about July 25, 2011.¹⁵

There was an audit of FCSA's 2011 Medicaid claims done. As a result of that audit, on August 15, 2016, Program Integrity notified FCSA that it was required to reimburse Alaska Medicaid for \$17,798 in payments that FCSA should not have received. Specifically, the auditor found that FCSA was not entitled to receive payment for the MHRs it provided to Recipients 1, 2, and 3 on the same dates as they were also receiving BRS from PHH.¹⁶ FCSA requested reconsideration of the repayment demand, which was denied.¹⁷

III. Discussion

A. *Applicable Regulations*

Program Integrity's August 15, 2016 repayment demand letter cites to 7 AAC 135.800(d). That regulation did not go into effect until October 1, 2011. Its predecessor regulation was 7 AAC 43.481(d), which was the regulation in effect at the times of the services provided by FCSA, which spanned from January 31 through August 30, 2011.¹⁸

7 AAC 43.481(d) read, at the relevant time period, as follows:

A severely emotionally disturbed child who has been approved to receive behavioral rehabilitation services is not eligible to receive mental health rehabilitation services provided under 7 AAC 43.470(e) on the same dates of service.

The list of mental health rehabilitation services contained 7 AAC 43.470(e) contains the following services: medication administration, functional assessments, case management, family skill development services, individual skill development services, group skill development services, day treatment services, recipient support services, and mental health clinic services.¹⁹

The list of behavioral rehabilitation services includes behavioral rehabilitation services provided in a "residential care, therapeutic foster care, or therapeutic group home setting."²⁰

¹⁴ Ex. S, p. 3. The exact date of placement is unclear because Ex. S only contains the second page of Recipient 2's placement agreement.

¹⁵ Ex. S, p. 4. The exact date of placement is unclear because the authorization form contains two separate signature dates (July 21 and 25, 2011) and does not contain a starting date for placement.

¹⁶ AR 4 – 5.

¹⁷ AR 8 – 18.

¹⁸ 7 AAC 43.481 was repealed and replaced in its entirety by 7 AAC 135.800 with an effective date of October 1, 2011, Register 199.

¹⁹ Each of these services are separately defined in other regulations, however, it is not necessary to address those underlying definitions.

²⁰ 7 AAC 43.481(b).

B. Summary Adjudication Standard

Both parties have moved for summary adjudication in their respective favors. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.²¹ It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, an evidentiary hearing is not required.²² In evaluating a motion for summary adjudication, if there is any room for differing interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom judgment may be granted.²³

C. Salient Facts

The salient facts in this case have been established. They are that Medicaid Recipients 1 through 3 were receiving BRS at PHH. They were also receiving MHRS from FCSA on the same dates they were receiving BRS from PHH.

D. Issues

This case presents two issues. The first is whether 7 AAC 43.481(d) precluded FCSA from being compensated for the MHRS it provided to the three Recipients on the same dates they were also receiving BRS from a separate provider, PHH. The second is whether Program Integrity is equitably estopped from requiring repayment of the amount it paid FCSA for the services in question.²⁴

E. 7 AAC 43.481(d)

The parties make a variety of arguments on the question of whether 7 AAC 43.481(d) forbids any payment to FCSA for the MHRS it provided to the Recipients on the same days as the Recipients were also receiving BRS from PHH. Program Integrity essentially argues that the regulation should be interpreted in a literal manner. FCSA makes several arguments otherwise, which include a discussion of the regulatory language, the discussions contained in departmental division manuals and its prior history with MHRS. Ultimately, however, it is not necessary to

²¹ See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000); 2 AAC 64.250.

²² See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

²³ *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

²⁴ The parties should be aware that there is a genuine issue of material fact regarding the exact days that PHH and FCSA both provided services to the Recipients, which in turn would affect the amount of Program Integrity's repayment claim. See fn. 1, *infra*. This would normally preclude entry of summary adjudication in either party's favor. However, given the disposition of this case, it is not necessary to address the issue further.

address and resolve these arguments, because as shown below, the facts of this case demonstrate that Program Integrity is equitably estopped from requiring repayment.

F. Equitable Estoppel

Even if Program Integrity’s interpretation of 7 AAC 43.481(d) is correct, the doctrine of equitable estoppel may, under certain circumstances, negate the enforcement of that regulation. In order to successfully invoke estoppel against a governmental agency, four elements must be established:

1. the assertion of a governmental position by either conduct or words;
2. an act which reasonably relied upon the governmental position;
3. resulting prejudice; and
4. “estoppel serves the interest of justice so as to limit public injury.”²⁵

In the recent case of *In re Consumer Direct Care Network Alaska*,²⁶ equitable estoppel was applied to disallow a Medicaid audit claim based upon the representation given by a Medicaid Division Director to a Medicaid provider. That decision discusses the application of equitable estoppel in these Medicaid audit cases:

When these four elements are met, the government may be estopped or partially estopped (that is, limited or prevented) from applying a restriction as written. For example, in *In re M.B.*,²⁷ a case decided by the Department of Health and Social Services in 2012, an eligibility technician inadvertently misled a Medicaid applicant into putting too little money into her Medicaid Qualifying Income Trust. The agency was found to be estopped from denying Medicaid coverage for that individual for the period when the trust was underfunded as a result of the error.

This principle has been found in two previous cases to prevent Program Integrity from insisting on start and stop times in the live-in context. That result was reached in *In re Consumer Care Network, Inc.*²⁸ and *In re U-Care Services*,²⁹ both cases involving oral approvals of the “live-in” timesheet entry in place of specific start and stop times. The approvals were given by an SDS quality assurance reviewer soon after the new regulations went into effect.³⁰

²⁵ *Wassink v. Hawkins*, 763 P.3d 971, 975 (Alaska 1988).

²⁶ *In re Consumer Direct Care Network Alaska*, OAH No. 18-1339-MDA, p. 7 (Comm’r of Health & Soc. Serv. 2019) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=6489>).

²⁷ Case No. 11-FH-496 (Office of Hearings & Appeals 2012).

²⁸ OAH No. 17-0933-MDA (Comm’r of Health & Soc. Serv. 2018) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2119>).

²⁹ OAH No. 17-1236-MDA (Comm’r of Health & Soc. Serv. 2018) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=6361>).

³⁰ *Consumer Direct* at p. 7.

Examining each of these elements for equitable estoppel in turn, the first question is whether there was a governmental assertion by either conduct or words. The undisputed facts are that FCSA submitted prior authorization requests for the services that it intended to provide to the Recipients to Alaska Medicaid and that Alaska Medicaid approved the services. In other words, FCSA was explicitly told, by the approval of the prior authorization requests by Alaska Medicaid, that it could provide MHRS to these Recipients.

Program Integrity, however, argues that the approval of the MHRS for the Recipients, did not constitute an approval for the Recipients to receive MHRS on the same days they also received BRS. The record, however, does not show any type of contingent approval. Instead, it shows that FCSA was authorized to provide MHRS to the Recipients during the dates in question, without any restrictions regarding those dates. This was an explicit authorization and satisfies the first element of the equitable estoppel test, being the assertion of a governmental position.

The second element is also satisfied. The authorization came from the appropriate governmental authority. It was therefore reasonable for FCSA to rely upon it.

The third element is also satisfied. FCSA has been prejudiced inasmuch as it provided services to the Recipients. The record is devoid of any evidence that FCSA was notified that there were limitations on its provision of MHRS to the Recipients because they were already receiving BRS from PHH. If that had happened, then FCSA could have stopped or modified providing its services to the Recipients.

The fourth element is also satisfied. “Regulated businesses should be able to rely upon the basic competence of the governmental regulators to provide correct guidance when incorrect guidance could invalidate all their billings.”³¹ Based upon the facts of this case, estoppel serves the interest of justice so as to limit public injury.

FCSA has therefore established that equitable estoppel precludes Program Integrity from disallowing its claims for providing MHRS to the Recipients.

//

//

³¹ *In re Consumer Care Network, Inc.*, Consolidated OAH Cases No.17-0933-MDA and 17-0983-MDA, p. 10 (Commissioner Health & Social Services 2018) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2119>).

IV. Conclusion

Program Integrity is equitably estopped from recovering the payments made by Medicaid to FCSA for the MHRS services it provided to the Recipients in this case. Accordingly, the requirement that FCSA reimburse the Medicaid program for these payments is REVERSED.

Dated: December 30, 2019

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 10th day of February, 2020.

By: *Signed*

Name: Doniel Wolfe

Title: Program Coordinator II

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]