

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

In the Matter of:)
)
L.U.) OAH No. 20-0775-MPC
_____)

DECISION

I. Introduction

L.U. is a certified personal care assistant compensated by Medicaid to provide personal care services for her child G.U., a Medicaid recipient. Her billing practices were investigated by the Medicaid Fraud Control Unit (MFCU), resulting in her being indicted for felony Medical Assistance Fraud. Due to her allegedly fraudulent billing practices, and her failure to notify her employer of the felony charge against her, on September 30, 2020 the Division of Senior and Disabilities Services (Division) terminated L.U.’s eligibility to be reimbursed by Medicaid as a personal care assistant. L.U. appealed, and a hearing was held.

Because the Division met its burden of proving that L.U. submitted fraudulent bills for services she did not provide her child, and that she did not timely inform her employer of being charged with felony Medical Assistance Fraud, the Division’s imposed sanction of terminating her participation as a provider in the Medicaid program is **AFFIRMED**.

II. Facts

A. Being a certified Medicaid provider

Alaska Medicaid is administered by the Alaska Department of Health and Social Services (Department), which has various units that manage the allocation and provision of Medicaid services for qualifying populations. The Division of Senior and Disabilities Services (Division) focuses specifically on the wellbeing of seniors, people with disabilities, and other vulnerable adults. It often works directly with care providers to ensure that every qualified Medicaid recipient has a plan of care (POC) that addresses the individual’s specific needs and goals. Frequently a POC includes allotted hours for distinct kinds of care, including day habilitation services (Day Hab), which are goal oriented and typically involve helping a recipient learn or practice adaptive skills outside the home, interacting within the community.¹

¹ 7 AAC 130.260.

To ensure these specific services are provided, a home healthcare agency may hire a designated personal care assistant (PCA) who is enrolled as a Medicaid provider.² The PCA must submit timesheets documenting the hours of Day Hab provided to their employing agency, and the agency in turn bills Medicaid.³ A PCA who works as a Medicaid provider must fulfill statutory expectations specific to the position, including maintaining complete records for Medicaid billing purposes that accurately document the days and times that approved services were provided.⁴ Additionally, a PCA charged with a barrier crime - one of a specified list of offenses set out in the Medicaid regulations - must timely inform the personal care agency.⁵ Included on this list is Medical Assistance Fraud.⁶

B. L.U.'s role in the plan of care for G.U.

L.U. is G.U.'s mother. She is married to G.U.'s father, S.U., and the two are G.U.'s co-guardians. S.U. is authorized to sign all of L.U.'s time sheets for the days and hours of Day Hab and PCA services L.U. provides to G.U. G.U. is 26 years old; he was seven when he was diagnosed with intractable epilepsy, global developmental delay, hearing impairment and encephalopathy.⁷ He is nonverbal but can communicate certain requests through gestures. He is able to manipulate a computer mouse and assemble puzzles. He has a wheelchair but can walk with assistance and supervision.⁸ He is a qualified Medicaid recipient, and his approved POC includes up to 24 hours per week of Day Hab services, approximately 40 hours per week of in-home PCA services, and 10 hours per week of respite services.⁹ The home healthcare agency is designated to provide these services, and hired L.U., a certified PCA since 2011, to be responsible for Day Hab and PCA services.¹⁰

C. Quality Assurance Unit

The Division has a Quality Assurance Unit tasked with ensuring that the care services provided contribute to the health and welfare of Medicaid recipients.¹¹ In addition to overseeing critical incident reports, conducting case record reviews, and facilitating communication between

² See 7 AAC 105.210.

³ *Id.*

⁴ 7 AAC 125.120.

⁵ 7 AAC 10.925, 7 AAC 10.905.

⁶ 7 AAC 10.905(c)(11).

⁷ Agency Record (AR) p. 27.

⁸ AR p. 28.

⁹ AR pp. 31 – 35.

¹⁰ AR pp. 30, 574.

¹¹ Alaska Department of Health and Social Services, Senior and Disabilities Services, Quality Assurance Unit, available at <http://dhss.alaska.gov/dsds/Pages/ServiceQA/default.aspx>.

Department agencies, Quality Assurance also investigates participant-related complaints and noncompliance. This includes situations where the totality of the circumstances involving an incident gives rise to a credible suspicion of fraud being committed by a Medicaid participant. On rare occasion a case may be referred to the Department of Law's Medicaid Fraud Control Unit (MFCU) for a criminal investigation.

D. The impetus for the involvement of the Quality Assurance Unit

In 2017 a care coordinator with the home healthcare agency, reported to the Division that the U Family was becoming unwilling to allow her to meet with G.U. to evaluate his progress and wellbeing, as required by the Division regulations.¹² According to the care coordinator, the U Family did little to facilitate staff being able to meet or speak with G.U. He was primarily seen sitting in the family vehicle, and not outside the car, engaging in any activities.¹³ The home healthcare agency reviewed L.U.'s service notes and found that much of what was being billed as "Day Hab" appeared to be L.U. running errands while G.U. was waiting in the car.

Beginning in the spring of 2017, the Division began to examine L.U.'s time sheets more closely. Staff noticed billing inconsistencies and discrepancies, such as a reported visit to a sports center that involved G.U. "identifying the bathrooms and exits when he was ready to leave" on a day the center was closed in observance of Memorial Day.¹⁴ On another day G.U. had reportedly visited seven different places in Wasilla and Anchorage and accomplished far more activities than was realistic in the four hours L.U. billed for Day Hab services.¹⁵ The Division had increasing concerns that L.U.'s time sheets did not accurately reflect the services that G.U. was receiving.

To investigate further, on December 18, 2017 Quality Assurance staff conducted surveillance of the U Family household from approximately 1:30 p.m. to 3:00 p.m. They reported that L.U. left the home with G.U. in the passenger seat of the car. The two went to Target and the post office, and at both stops L.U. left her car and went into the buildings, while G.U., who has a seizure disorder, was left unsupervised in the passenger seat of the vehicle.¹⁶ On the way home they stopped at the school and picked up L.U.'s daughter.¹⁷ On her timesheet

¹² AR pp. 337, 418; *see* 7 AAC 105.220.

¹³ AR p. 337.

¹⁴ AR p. 441.

¹⁵ AR p. 442.

¹⁶ AR p. 630.

¹⁷ AR p. 631.

for that day L.U. reported that she had worked with G.U. at home from 10:45 a.m. to 5:00 p.m., and billed Medicaid accordingly.¹⁸

Based on the observations of the staff of home healthcare agency and Quality Assurance that G.U. was not receiving appropriate Day Hab services, coupled with the irregularities in L.U.'s timesheets, the matter was referred to the Medicaid Fraud Control Unit (MFCU) of the Department of Law.¹⁹

E. The Medicaid Fraud Control Unit investigation

The case was assigned to Investigator Don McLeod of the MFCU, who began investigating G.U.'s Day Hab services in the spring of 2018. From March 18 through March 21, 2018 he conducted personal surveillance of L.U. Thereafter a camera mounted on a utility pole in the U Family's neighborhood recorded the cars that entered and left their residential driveway.

On March 19, 2018 Investigator McLeod did not observe a vehicle arrive or depart from the U Family residence between 1:00 p.m. and 4:00 p.m.²⁰ However, the time sheet submitted to the home healthcare agency by L.U. (and approved by S.U.) reported that she conducted Day Hab with G.U. from 1:00 p.m. to 5:00 p.m. that day.²¹ More specifically, she reported that she and G.U. had gone to the post office, credit union, an herbal store and to the school to pick up another child.²²

On March 21, 2018 L.U.'s time sheet reflected that she had conducted Day Hab with G.U. from 1:00 p.m. to 5:00 p.m., which included going to the post office, Fred Meyer, Pet Zoo, and the school to collect a child.²³ Investigator McLeod, however, witnessed the U Family's blue Honda Odyssey leave the U Family's residence at 11:41 a.m. with S.U. driving, G.U. in the front passenger seat, and L.U. in the rear of the vehicle.²⁴ They drove to the credit union where only Robert exited the vehicle, then to the library where everyone got out and went inside for less than 20 minutes, then on to the post office and gas station where only Robert exited the vehicle, then back to their residence.²⁵ They were gone for approximately an hour.²⁶ Investigator McLeod continued watching the home and noted that no additional vehicles came or went from the U

¹⁸ AR p. 443.

¹⁹ AR p. 420.

²⁰ AR p. 427.

²¹ AR p. 445.

²² *Id.*

²³ AR p. 448.

²⁴ AR p. 428.

²⁵ *Id.*

²⁶ AR p. 429.

Family residence.²⁷ He left at 1:45 p.m. when S.U. confronted him about his presence in the neighborhood.²⁸

Following the interaction between Investigator McLeod and S.U., on April 11, 2018 an MFCU camera was installed on a telephone pole near the U Family home to monitor the vehicles entering and exiting the U Family's driveway.²⁹ The camera recorded video for 19 days.³⁰ Investigator McCleod also collected video surveillance tapes from the school and the Fred Meyer store for the dates that L.U. had reported in her notes that she took G.U. out for Day Hab.³¹ He also requested timesheets and notes submitted by L.U. to the home healthcare agency.³² On September 20, 2018 he also met with L.U. and her attorney to verify her notes.

After cross checking and synthesizing all this information, Investigator McLeod documented the following inconsistencies:³³

1. On April 9 and April 11, 2018 L.U. billed for 8 hours of Day Hab services at times and locations in the community that made completion of the hours impossible.
2. Between the dates of April 11 and April 30, 2018 there were 10 days that L.U. billed for Day Hab services that she did not provide.
3. Between May 1 and June 23, 2018 there were 7 days that L.U. billed for providing Day Hab hours to G.U. at Fred Meyers. Video surveillance from the store showed that she and G.U. were not at the store on any of these days.

F. The indictment

Based on the billing inaccuracies documented in the investigation, the Department of Law elected to file criminal charges against L.U. and S.U. On November 29, 2018, L.U. and S.U. were both charged with felony Medicaid Fraud. When the case was brought before a grand jury on February 6, 2019, however, only L.U. was indicted for felony Medical Assistance Fraud under AS 47.05.210(a)(1).³⁴ On October 11, 2019, a plea agreement was reached, under which S.U. plead guilty to a misdemeanor, Misapplication of Property, under AS 11.46.620(D)(2), and the charges against L.U. were dismissed by the prosecutor.³⁵

²⁷ *Id.*
²⁸ AR p. 430.
²⁹ AR p. 420.
³⁰ *Id.*
³¹ *Id.*
³² *Id.*
³³ AR p. 421.
³⁴ AR p. 608.
³⁵ AR p. 744.

G. The Division's report

In part due to the concerns arising from the criminal investigation, the Division elected to conduct a review of personal care services L.U. provided from 2017 – 2020 to determine if they were appropriate vis-à-vis G.U.'s support plan and in compliance with applicable regulations. On September 1, 2020, the Division issued a report regarding the following allegations against L.U:³⁶

- Allegation #1: L.U. submitted timesheets for PCS services not provided on multiple occasions between December 2017 and May 2018.
- Allegation #2: L.U. submitted service notes and timesheets for Day Hab services not provided in accordance with [conditions of participation] and regulations.
- Allegation #3: L.U. violated the terms of her Personal Care Assistant Agreement signed on January 8, 2013 and again on October 24, 2018.
- Allegation #4: L.U. failed to notify the home healthcare agency that she had been charged with a barrier crime.

The report substantiated all four allegations under various Medicaid regulations for actions that included submitting falsified timesheets, picking her daughter up at a time she was billing for Day Hab services, billing inflated hours, billing time that G.U. remained in the vehicle while she ran errands, and failing to report to the home healthcare agency that she was charged with a barrier crime in violation of her PCA agreement.³⁷

The Division determined there were multiple grounds on which to sanction L.U. under the applicable disciplinary Medicaid regulation.³⁸ Pursuant to 7 AAC 105.410(1) and (11), the Division stated its intention to impose the following sanctions:

1. Termination from participation in the Medicaid program, and
2. Public notice of suspension or termination of a provider.

L.U. objected, and she timely appealed the Division's findings and proposed sanctions pursuant to 7 AAC 105.460.

³⁶ AR p. 741.

³⁷ AR pp. 745 - 746. *See* 7 AAC 105.230, 7 AAC 125.120, 7 AAC 130.260, Day Hab Services Conditions of Participation, Personal Care Assistant Agreement.

³⁸ 7 AAC 105.400

III. Procedural background

On September 18, 2020 L.U.'s case was referred to the Office of Administrative Hearings. The administrative hearing was held via teleconference on October 9, 2020.³⁹ The Division was represented by Assistant Attorney General Paul Peterson. L.U. represented herself, testified on her own behalf, and was assisted by S.U. The Division presented testimony from MFCU Investigator Don McLeod, Division investigator Christina Kent, and Division Quality Assurance Manager Meg Sampson. The record was closed at the end of the hearing, and the matter was taken under advisement.

IV. Discussion

A. *Medicaid provider regulatory requirements*

In order for a business or service provider to receive payment from the Medicaid system for services provided to Medicaid recipients, they must be enrolled as a Medicaid provider with the Department.⁴⁰ This includes acknowledging responsibility for “all information and claims submitted to the department” by the business or provider and agreeing to comply with background check requirements.⁴¹ A provider is subject to sanctions for submitting false billings for services, for engaging in a course of conduct which is deceptive or abusive to the Medicaid program, for breaching the terms of the Medicaid provider agreement, and for failing to maintain accurate records for services provided to Medicaid recipients.⁴² A provider must provide notice to his or her PCS provider agency within 24 hours if the provider has been charged with a felony or other barrier crime.⁴³

B. *The violations*

As mentioned above, the Division's investigation of L.U. made four primary allegations, encompassing: (1) timesheets for PCS services not provided on multiple occasions between December 2017 and May 2018; (2) service notes and timesheets for Day Hab services not provided in accordance with regulations; (3) L.U.'s violations of the terms of her PCA Agreement; and (4) failure to notify the home healthcare agency that she had been charged with a barrier crime signed. The Division had the burden of proving the factual elements of these

³⁹ Due to the coronavirus pandemic, an in-person hearing was not available; L.U. declined the option of a hearing via videoconference.

⁴⁰ 7 AAC 105.210(a).

⁴¹ 7 AAC 105.210(b)(4), (6).

⁴² 7 AAC 105.400(1), (6), (7) and (41).

⁴³ 7 AAC 125.120(g).

allegations by a preponderance of the evidence. The Division met its burden as to all four allegations.

As to allegation #1, the Division established through credible testimony and documentation that L.U. submitted numerous timesheets billing for PCA services at specific times when she physically could not have been providing G.U. those services as described in the timesheets. The evidence of these discrepancies and inconsistencies in her PCA billings was essentially uncontroverted by L.U. at the hearing.

The Division also met its burden as to allegation #2; it proved by far more than a preponderance of the evidence that L.U. submitted Day Hab timesheets and service notes for services she could not and had not provided to G.U. at the described times and locations. Again, L.U. did not offer any credible evidence to counter the Division's showing on these points. The Division established that these actions were in violation of Medicaid regulations applicable to Day Hab services.

As to allegation #3, the above-described acts clearly constituted violations of the governing regulations, and along with other record-keeping failures were in violation of L.U.'s PCA agreement. Regarding allegation #4, there is no dispute that L.U. failed to notify her personal care provider agency that she had been indicted on felony Medicaid fraud charges. In fact, the home healthcare agency apparently did not learn of the felony indictment until informed of it by the Division.⁴⁴

L.U.'s primary rebuttal to the Division's allegations was that her errors were unintentional; she contended that the home healthcare agency told her that it was more important that she recorded "what she did" in providing services to G.U. rather than when it happened. This contention is simply not plausible, in light of the regulatory requirement that the provider must affirm the veracity of her billings every time they are submitted for payment, and the provider's agreed-to obligation to understand and follow Medicaid billing requirements. As a Division witness explained, it is not credible that L.U. would have been told by the home healthcare agency that recording *when* she provided services to G.U. was not important, because such advice is equivalent to advising her to commit Medicaid fraud. In any event, even if the home healthcare agency truly told her that, such wrong-headed advice would not excuse L.U.'s violations of the law.

⁴⁴ Kent testimony.

L.U. also attempted to rebut the Division’s evidence by asserting that Mr. McLeod’s testimony about his observations of her driving around doing errands with G.U. in the car were inaccurate because it was actually her daughter with her in the car rather than G.U. The Division, however, successfully pointed out that whether or not G.U. was in the car with her was irrelevant. Either G.U. was riding around in her car not receiving services, or he was sitting at home not receiving services while L.U. was running errands with her daughter. In either event the evidence established that L.U. was not providing the services to G.U. that she had billed Medicaid for on those specific dates, times, and locations.

The key element in the Division’s successful proof of its allegations here was that it showed that on numerous occasions, L.U. billed Medicaid for services at specific times and locations that the Division was able to prove she simply did not and could not have performed for G.U. The Division’s evidence in support of these allegations was clear, credible, and essentially ultimately undisputed by L.U.

C. Sanctions

The Division presented substantial undisputed evidence that established that L.U. committed the regulatory violations discussed above. The Division further established that the violations are ground for sanctioning L.U., under the provisions of the Division regulation at 7 AAC 105.400.⁴⁵ Six specific sections of the regulation list the following grounds for sanctions that are applicable to L.U.’s actions in this matter: (1) presenting or causing to be presented for payment any false or fraudulent claim for services or supplies;⁴⁶ (2) engaging in a course of conduct or performing an act the department considers deceptive or abusive of the Medicaid program;⁴⁷ (3) breaching the terms of the Medicaid provider agreement or failing to comply with the terms of the provider certification on the Medicaid claims form;⁴⁸ (4) violating any provision of AS 47.07 or any regulation adopted under it;⁴⁹ (5) failing to perform an act that is within an individual's competence and training that is necessary to prevent harm or an increase in the risk of harm to a recipient;⁵⁰ and (6) failing to maintain for each recipient, as required under [pertinent Division regulations], a contemporaneous and accurate record of the services

⁴⁵ Division Report of Investigation, Sept. 1, 2020, p. 7.

⁴⁶ 7 AAC 105.400(1).

⁴⁷ 7 AAC 105.400(6).

⁴⁸ 7 AAC 105.400(7).

⁴⁹ 7 AAC 105.400(10).

⁵⁰ 7 AAC 105.400(38).

provided.⁵¹ L.U.'s violations described and discussed above clearly constitute grounds for sanctions under these provisions of 7 AAC 105.400.

Having established that L.U. had committed violations of Medicaid regulations that are sufficient grounds for sanctions, the Division then proceeded to determine the appropriate sanction to impose for these violations. A Division regulation provides that a provider found to have violated the above regulatory provisions can be terminated, suspended, have a restriction or withholding of payments imposed, and other lesser sanctions including required mandatory provider education sessions and public notice of suspension or termination.⁵² Factors that must be considered in determining the appropriate sanction are as follows:

- (1) seriousness of the offense[s];
- (2) extent of violations;
- (3) history of prior violations;
- (4) prior imposition of sanctions;
- (5) prior provision of provider education;
- (6) provider willingness to obey program rules;
- (7) whether a lesser sanction will be sufficient to remedy the problem; and
- (8) actions taken or recommended by peer-review groups or licensing boards.^[53]

The Division formed a “sanctions committee” to consider the application of these factors to L.U.'s violations. It was composed of Division investigator Ms. King, Division Quality Assurance Manager Meg Sampson, Medicaid Program Integrity Manager Douglas Jones, and Division Quality Chief Lynne Keilman-Cruz. Ms. Sampson testified that the committee considered each of the factors, and the first factor – the seriousness of the offenses – stood out in their discussions. She testified that in the committee’s view, “this was as serious as it could be,” given that in a sample of 20 days of observation, 15 days of L.U.’s billings contained significant false entries and timesheet discrepancies. The committee reached similar conclusions regarding the second factor, the extent of the violations. As to the third and fourth factors, L.U. had no history of prior violations or prior imposition of sanctions, and the fifth factor – prior provider education received by her – did not play a role in the determination. Regarding the sixth factor, the committee reached a similar conclusion it did with the first factor, in that the extent and severity of L.U.’s violations indicated an utter lack of willingness to obey program rules. The seventh factor – whether a possible lesser sanction could remedy the problem – was generally discussed in the Committee, but it was felt that L.U.’s violations were so egregious and had gone

⁵¹ 7 AAC 105.400(41).

⁵² 7 AAC 105.410.

⁵³ 7 AAC 105.420.

on for such an extended period that anything less than termination would not be a sufficient sanction.⁵⁴ The Committee’s decision to terminate was unanimous.

Having considered all of the above-discussed factual findings and taking into account the entirety of the circumstances described in the documents and testimony, the undersigned administrative law judge agrees with the committee’s conclusion that L.U.’s violations rose to a sufficient level of seriousness, with a substantial impact on the provision of services to G.U., such that termination is an appropriate sanction. A termination under the facts presented here is the correct sanction given the extent and egregiousness of L.U.’s violations.

IV. Conclusion

The Division met its burden of proving that L.U. submitted fraudulent bills for services she did not provide her child, and that she did not timely inform the home healthcare agency that she had been charged with felony Medical Assistance Fraud, and that termination of her participation as a provider in the Medicaid program is an appropriate sanction. The Division decision imposing the sanction of termination is therefore affirmed.⁵⁵

Dated: February 5, 2021

Signed

Andrew M. Lebo
Administrative Law Judge

⁵⁴ Sampson testimony.

⁵⁵ L.U. did not contest the Division’s second sanction of “public notice of termination;” that sanction is also affirmed.

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 22nd day of March, 2021.

By: Signed_____

Name: Jillian Gellings_____

Title: Project Analyst, DHSS_____

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