BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH

In the Matter of	)	
	)	
ABDOULIE LOWE, D/B/A	)	
APAPA ASSISTED LIVING HOME	)	OAH No. 22-0965-MPC
	)	

DECISION

I. Introduction

Abdoulie Lowe, d/b/a Apapa Assisted Living Home, is an Alaska Medicaid provider. Following an investigation by the Department's Quality Assurance Unit (Division), the Division determined that he should be sanctioned by termination from participation in the Medicaid program, by referral for a fiscal audit, and by public notice of his termination or suspension, as appropriate, as a Medicaid provider.

Simultaneously, Mr. Lowe was applying for renewal of his certification as a Medicaid provider. That certification was denied.

Mr. Lowe appealed both the denial of his renewal certification, and the sanctions imposed against him.

The evidence demonstrates that Mr. Lowe failed to complete his Medicaid certification renewal application within applicable time limits, despite being given numerous extensions and opportunities to complete it. Consequently, the denial of his Medicaid certification renewal is upheld.

The evidence further demonstrates that Mr. Lowe provided Medicaid services to a highly vulnerable intensive need population. In that capacity, he exhibited a disregard of regulatory requirements for employee background check requirements, a disregard of his regulatory obligations to maintain ALH resident records, to supply them to the Division upon request and to have them to support his Medicaid billings, and a disregard of his obligations to maintain both general liability insurance and workers' compensation insurance. He also exhibited a disregard of his obligations to keep the guardians and Medicaid Care Coordinators for these vulnerable Medicaid recipients involved in decision making and notifying them of something as fundamental as where the recipients were residing. Further, he late filed a critical incident report that misstated the facts of that incident. The extent of his lack of compliance justifies the sanctions requested by the Division. Accordingly, the sanctions sought by the Division, being

the termination of his participation as a Medicaid provider, the referral for a fiscal audit, and public notice of his termination, are upheld.

II. Facts and Procedural History

Mr. Lowe is certified as an Alaska Medicaid provider for Medicaid Home and Community-Based Waiver services, which consist of Day Habilitation, Residential Habilitation-Group Home and Residential Habilitation-Supported Living.[1] He provides housing and care for difficult to place Medicaid recipients, several of whom experience severe psychiatric conditions, extensive psychiatric hospitalization histories, and engage in violent and disruptive behaviors. He provides a high quality of care for these recipients and can deescalate their behaviors.[2]

Mr. Lowe's certification as a Medicaid provider was due to expire on May 31, 2022. He applied to renew his recertification on April 4, 2022.[3] His recertification was denied on November 30, 2022.[4] While the recertification process was ongoing, Mr. Lowe was being investigated by the Division beginning in late October and early November 2022. Following its investigation, the Division sent Mr. Lowe its report on November 30, 2022 that concluded he should be sanctioned by termination as a provider for the Medicaid program, referral for a fiscal audit, and public notice of his termination.[5]

Mr. Lowe appealed both the denial of his recertification and the sanctions imposed by the Division. His hearing was held on March 28 and 29, 2023. The relevant facts are provided below.

A. Certification Renewal

Mr. Lowe began operation as a Medicaid provider in the summer of 2021.[6] He was certified as a Medicaid provider for one year. His certification was due to expire on May 31, 2022. On February 24, 2022, the Division of Senior and Disabilities Services (DSDS) notified him of the pending expiration and that he needed to submit his renewal application no later than April 1, 2022.[7]

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1 Ex. H, p. 3.
2 Mr. Lowe's testimony; Ms. Dishaw's testimony; Ex. 1.
3 Ex. F.
4 Ex. D.
5 Ex. B.
6 Mr. Holden's testimony.
7 Ex. H, pp. 3 -4.

The Division received Mr. Lowe's renewal application on April 4, 2022.[8] That application was incomplete. After multiple contacts with him, the Division sent him formal notice on July 5, 2022 that several of his forms had not been filled out completely, e.g., missing EIN/Tax Id numbers, Medicaid Provider number, and an effective start date for his group home habilitation site. Required documents were also missing: copies of his business license, proof of insurance, an organization chart and personnel list, his quality improvement report, his assisted living home license(s), and certification that he had completed required training. In addition, his "Independence and Inclusion Policy and Procedure" was incomplete. Mr. Lowe was given a deadline of July 19, 2022 to provide the missing information.[9]

Mr. Lowe left the United States on July 4, 2022 due to a serious illness in his immediate family.[10] On July 19, 2022, Mr. Lowe requested an extension until the end of the month to supply the requested information because he was "out of the country due to [his] dad being very sick."[11] His request was granted. He was given a new deadline of August 5, 2023, and written notice was sent to him on July 22, 2022, which contained the same information as the July 5, 2022 notice.[12] He returned to Alaska on August 17, 2022.[13]

As of August 30, 2022, Mr. Lowe had not yet responded to the Division's deficiency notice. The Division resent him the notice and extended the response deadline to September 13, 2022.[14] As of September 28, 2022, Mr. Lowe had not responded to the earlier notices, nor had he been in contact with Division's reviewer since the end of July 2022. The Division's reviewer attempted to phone him and left him a voicemail. She then resent him the deficiency notice, with a new due date of October 12, 2022.[15] Mr. Lowe sent the Division an email on October 7, 2022, stating that he would provide the information by the October 12, 2022 deadline.[16] He did not provide the information by the deadline, and on October 22, 2022, the Division sent him an email giving him until October 28, 2022 to provide the information.[17]

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8 Ex. F.
9 Ex. G, pp. 28 – 32; Ms. Bearden's testimony.
10 Mr. Lowe's testimony.
11 Ex. G, p. 21.
12 Ex. G, pp. 16 – 21.
13 Mr. Lowe's testimony.
14 Ex. G, pp. 9 – 14.
15 Ex. G, pp. 1 – 6.
16 Ex. D, p. 2.
17 Ex. D, p. 2.

Each of the written notices provided to Mr. Lowe specifically notified him that "[i]f you are unable to meet this deadline, you must contact Provider Certification prior to this date to arrange for additional time. Failure to contact Provider Certification may result in the closure or denial of your Medicaid certification.[18]

Mr. Lowe did not request an extension to the October 28, 2022 deadline.[19] Mr. Lowe undisputedly did not respond to the Division's deficiency notices. His general liability insurance lapsed in either February or March of 2022. He was waiting for it to get reinstated before he responded to the Division's deficiency notices. In addition, after he submitted his recertification application, his Workers' Compensation Insurance expired in June of 2022 and had not yet been reinstated as of March 2023. Mr. Lowe explained that he was unaware of the lapse in his Workers' Compensation Insurance until early 2023 because his staff had been putting his mail in a location where he did not see it until well after it came in.[20]

The Division notified Mr. Lowe on November 30, 2022 that his renewal certification application was denied because he did not supply the required information necessary to complete his application.[21]

B. Sanctions

Mr. Lowe owns and operates an assisted living home (ALH) located on Glacier Ave. in Anchorage, Alaska. The ALH is licensed to care for two residents who have a mental or developmental disability. On October 31, 2022, the Department of Health's Assisted Living Licensing and Adult Protective Services units made an unannounced visit to that location. They discovered that one of the residents ("Resident 1") who was supposed to be residing at that location had been living at a different supported living facility location for approximately two months, and that the resident's guardians and Medicaid Care Coordinator were unaware that he had been moved to a different location, and still thought he was residing at the Glacier Ave. location.[22] It is undisputed that Resident 1 is developmentally disabled and has a history of institutionalization and incarceration due to violent behaviors.

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[18] Ex. G, p. 29 (July 5, 2022 notice); Ex. G, p. 16 (July 22, 2022 notice); Ex. G, p. 9 (August 30, 2022 notice); Ex. G, p.2 (September 28, 2022 notice); Ex. G, p. 24 (October 24,2022 notice).

[19] Ms. Bearden's testimony.

[20] Mr. Lowe's testimony.

[21] Ex. D.

[22] Mr. Holden's testimony.

In addition, there was a person present at the Glacier Ave. location during the October 31, 2022 visit, Mr. Kujabi, who identified himself as a caregiver. However, Mr. Kujabi had not undergone a background check with the Department. Mr. Lowe was contacted, and he verified that the resident had been moved, and stated that Mr. Kujabi was not a caregiver, but was rather just on the premises to clean them.[23]

The October 31, 2022 visit to the Glacier Ave. location prompted an investigation by the Division's Quality Assurance unit. Mr. Holden, an investigator with that unit and Esther Hayes, his supervisor, made an unannounced visit to Mr. Lowe's business location on Glacier Ave. on November 4, 2022. Mr. Lowe was there, and they asked for recipient records including personnel files. Mr. Lowe was unable to provide the records, stating that his laptop that contained the records was located at a different location and was broken. He said he could bring the laptop to BestBuy and have them recover the files and he would send them by encrypted email to the Division by 7 p.m. that evening. Mr. Lowe did not provide the records by 7 p.m., nor did he contact the Division before then. On November 7, 2022, Mr. Lowe sent some records, but they were incomplete and did not contain all the required information. He also asked for an extension to the date of providing records, saying that he had information on a flash drive, but he did not know where the flash drive was.[24]

Mr. Holden made an unannounced visit to Mr. Lowe's Fawn Court location on November 8, 2022, where he met Mr. Lowe. At that time, Mr. Lowe told Mr. Holden that he did not have any records at the Fawn Court location, but he did have a shoebox with some records in his car, which he gave to Mr. Holden to make copies of. Those records did not contain all the required information and were for only three of Mr. Lowe's four residents and were incomplete consisting of care records for random days and did not include any records for services predating September 2022. Mr. Lowe also told Mr. Holden that he had not located the flash drive which contained service notes and thought that the flash drive might be in his Seattle apartment.[25] On November 9, 2022, the Division issued Mr. Lowe a cease-and-desist notice, notifying him that he was no allowed to submit future billings for Medicaid services unless he had supporting documentation. He, however, as of November 16, 2022, had submitted additional billing claims,

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23 Ex. M, p. 5 -7.
24 Mr. Holden's testimony.
25 Mr. Holden's testimony.

and in a Division visit on November 18, 2022, did not provide service records to support those claims. Mr. Lowe has submitted billing claims to the Division in the approximate amount of $700,000 for which there is no supporting documentation. [26]

It is undisputed that Mr. Lowe did not provide the Division with all the Medicaid records documenting services to his residents. He provided various explanations for this, including his laptop being damaged, his daughter's laptop, which he used to keep some records on, being damaged, being unable to locate the flash drive where some of the records were located, and one of his residents destroying paper records.[27]

During the November 4, 2022 visit, Mr. Holden found out that another resident ("Resident 2") had also been moved from the ALH where he was supposed to be residing. As with Resident 1, neither Resident 1's guardian or Medicaid Care Coordinator was informed of the move. As with Resident 1, Resident 2 is undisputedly developmentally disabled with a history of institutionalization and incarceration due to violent behaviors. However, unlike Resident 1, the guardian was informed after the fact.[28]

During its investigation, the Division determined that Mr. Lowe had seven employees, in addition to himself, who provided services for which background checks were required. Three of those employees were fully compliant with background check requirements. Three employees, Saffie Faal Cham, Yusupha Lowe, and Matarr Saine, had current background checks, but they were not associated with Mr. Lowe's business.[29] They all began working for Mr. Lowe in April of 2022.[30] In a recorded interview with both Mr. Holden and Ms. Hayes on November 4, 2022, Mr. Lowe also identified Bekai Cole as one of the caregivers.[31] Bekai Cole did not have a background check.[32]

Mr. Lowe did not dispute that Saffie Faal Cham, Yusupha Lowe, and Matarr Saine were care providers who did not have background checks associated with APAPA Assisted Living Home. His explanation was that he had computer problems when he tried to have associate them with his business but did not have time to correct the association. He admittedly did not contact

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26 Ex. B, p. 7; Mr. Holden's testimony.
27 Mr. Lowe's testimony.
28 Mr. Holden's testimony.
29 Mr. Holden's testimony.
30 Mr. Lowe's testimony.
31 AR 786, at 6:00 – 7:40.
32 Mr. Holden's testimony.

the Division's Background Check Unit to correct the problem. However, he testified that Mr. Cole was not yet an employee, and had just arrived in Anchorage on November 3, 2022. Mr. Lowe supplied a copy of a United Airlines itinerary showing Mr. Bekai arriving in Anchorage late the evening of November 3, 2022.[33]

While the Division was investigating Mr. Lowe, an incident occurred during which a resident (Resident 1) assaulted and injured a staff member. A critical incident report was filed with the Division on November 11, 2022 at 7:44 a.m., indicating that the incident occurred on November 10, 2022 at 10:00 a.m. The report indicated that the resident attacked a staff member, bit the staff member's left food, and that the resident was taken to the emergency room due to a swollen hand. Mr. Lowe stated that he was the one injured.[34] However, that incident actually occurred on November 9, 2022 at approximately 10:00 p.m. Ms. Hayes, Mr. Holden's supervisor, subsequently saw Ms. Cham, one of Mr. Lowe's caregivers, on November 18, 2022 several days thereafter, and observed her face was visibly bruised and she had an injured left hand. Ms. Cham was the staff member injured by the resident in question. She told Mr. Holden that she had to seek medical care for her injured left hand and that she was having some problems using it.[35]

During the course of the investigation, the Division also found out that Mr. Lowe did not maintain employee records or payroll documents and had been paying his employees in cash for their services. He contacted the Dept. of Labor and Workforce Development Unemployment Insurance unit and found that Mr. Lowe had not reported having any employees.[36]

Mr. Lowe did not dispute that he did not maintain a payroll or employee records, and instead paid them in cash. While he stated that he had records showing that his employees had required trainings and certifications, he was not able to provide copies of those documents to the Division upon its request. He did not dispute that both his general liability insurance and his workers' compensation insurance had lapsed. He attributed the lapse in his workers' compensation insurance to his staff receiving notices in the mail and putting them in a location

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33 Mr. Lowe's testimony; Ex. 2.
34 Ex. L.
35 Mr. Holden's testimony; Ms. Hayes' testimony.
36 Mr. Holden's testimony.

that he was not aware of. He attributed the lapse in his general liability insurance to the insurance company no longer doing business in Alaska.[37]

Following its investigation, the Division issued its report on November 30, 2022. That report concluded that Mr. Lowe should be sanctioned by termination from participation as a Medicaid provider, that he be referred for a fiscal audit, and that there be a public notice of his suspension of termination.[38]

Mr. Lowe operated an assisted living home between 2004 and 2011. That home was investigated by the Division's Certification and Licensing unit in 2011, which resulted in a report that found his assisted living home license should be revoked.[39] Mr. Lowe appealed the revocation.[40] Mr. Lowe and the Division subsequently entered into an agreement, wherein the Division rescinded its enforcement action and Mr. Lowe voluntarily relinquished his assisted living home license. That settlement agreement did not contain any admissions by Mr. Lowe.[41]

III. Discussion

A. Burden of Proof

This case has two issues that must be resolved. The first issue is the denial of Mr. Lowe's certification renewal. Because this concerns the denial of a renewal of a license, it is the equivalent of taking away a license and the Division bears the burden of proof.[42] The Division also has the burden of proof on the question of whether Mr. Lowe should be sanctioned.

B. Certification Renewal

Mr. Lowe's Medicaid provider certification was due to expire on May 31, 2022. Certification applications, which would include renewals of that certification, require the provider to provide certain items of information. The *Provider Conditions of Participation for Home and Community-Based Waiver Services and Community First Choice Chore Services* (hereinafter "Provider Conditions"), which are incorporated into regulation,[43] specifically require that applications for certification and recertification must include the following documents: State

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37 Mr. Lowe's testimony.
38 Ex. B.
39 Ex. J, pp. 8 – 21.
40 Ex. J, p. 22.
41 Ex. J, pp. 1 – 6.
42 "Ordinarily the party seeking a change in the status quo has the burden of proof." *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); Also *see In the Matter of Icy Strait Lodge*, OAH Case No. 22-0129-ABC (ABC Board March 9, 2023), p. 14, fn. 76.
43 7 AAC 160.900(d)(4).

of Alaska business license, certificates of general liability and workers' compensation insurance, assisted living and foster home licenses, training verification, an organization chart, a personnel list, and a quality improvement report.[44]

It is undisputed that Mr. Lowe did not provide documents required to be attached to the application: business license, proof of insurance, an organization chart and personnel list, his quality improvement report, his assisted living home license(s), and certification that he had completed required training. In addition, his "Independence and Inclusion Policy and Procedure" was incomplete.

The Division gave Mr. Lowe notice of the deficiencies in his application, and what information and documents were missing, and gave him multiple extensions to provide the missing information and documents:

- Mr. Lowe was notified on July 5, 2022 of the deficiencies in his application, and given a deadline of July 19, 2022 to provide the missing information and documents.
- He requested an extension, and was given until August 5, 2022 to provide the missing information and documents.
- After Mr. Lowe did not respond by the August 5, 2022 deadline, the Division gave him an extension until September 13, 2022 to provide the missing information and documents.
- After Mr. Lowe did not respond by the September 13, 2022 deadline, he was given an extension until October 12, 2022 to provide the missing information and documents.
- After Mr. Lowe contacted the Division on October 7, 2022, stating that he would meet the October 12, 2022 deadline, he did not, and the Division gave him a further extension until October 28, 2022 to provide the missing information and documents.

Mr. Lowe was notified of each extension in writing. Each of those written notices listed the missing information and documents, and advised him that denial of his application was a consequence.

The Division then denied Mr. Lowe's application to renew his Medicaid provider certification on November 30, 2022. After that denial, he requested this hearing.

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[44] The "Provider Conditions of Participation" adopted into regulation have been revised multiple times in the recent years. However, the versions in effect from January 1, 2021 through the present, which cover the entire time Mr. Lowe's business has been in operation, contain these identical provisions. *See* Exs. E1, E2, and E3, §§ I(A)(4)(a) –(d).

It is undisputed that Mr. Lowe did not provide any of the requested information or documents. Each of the items listed as missing from his recertification application are listed as required in the Provider Conditions adopted into regulation. Mr. Lowe did not present any argument or evidence that the Division already had or did not need any of the requested items. Accordingly, the Division has met its burden of proof on this point and established that despite multiple warnings and extensions of deadlines, that Mr. Lowe failed to provide the documents required by regulation that were necessary to complete his recertification application. Accordingly, the denial of Mr. Lowe's application for recertification as a Medicaid Provider is affirmed.

C. Sanctions

1. Alleged Violations

The Division has alleged that Mr. Lowe has violated a number of its regulatory requirements and should be sanctioned for them. These are addressed in the same order as set out in the Division's November 30, 2022 "Report of Investigation."

a. Person-Centered Practice and Recipient Safeguards (Division Findings, Allegation 1).[45]

This allegation involves two recipients, both of whom have court-appointed legal guardians and Medicaid Care Coordinators. The undisputed evidence that Mr. Lowe unilaterally moved both recipients (Resident 1 and Resident 2) from one residence to another without their guardians or Medicaid Care Coordinators being consulted with, consenting to the move, and not being notified at the time of the move.

In the case of Resident 1, the Division investigators discovered that he had moved from Mr. Lowe's Glacier Ave. address to a different residence when they made an unannounced visit to the Glacier Ave. address on October 31, 2022. It is undisputed that Resident 1 was living at another residence for approximately two months before the Division found out about his move. It is undisputed that his guardian and Medicaid Care Coordinator did not find out about the move until the Division notified them.

In the case of Resident 2, the Division investigator found out on a November 4, 2022 contact with Mr. Lowe, that he had also been moved from to a separate residence. His guardian

[45] Ex. B, p. 4.

was notified of the move after the fact, but the Medicaid Care Coordinator did not find out about the move until notified by the Division.

The Division alleged that this moving of both Resident 1 and Resident 2 constituted a violation of two regulatory requirements, that the provider provide a person-centered practice and that it provide appropriate safeguards to assure a recipient's "health, safety, and welfare."

The Medicaid Home and Community-Based Waiver regulations mandate what is referred to a "person-centered practice." Those regulations mandate, among numerous other requirements, that the providers, which would be Mr. Lowe and a recipient's Medicaid Care Coordinator, work with the recipient to develop a written support plan.[46] Among the regulatory provisions addressing the recipients written support plan is one that requires that the plan "reflect that the setting in which the recipient resides is chosen by the recipient."[47] Those same regulations require that a home and community-based provider, which Mr. Lowe, is "shall (1) protect a recipient's health, safe, and welfare while rendering a service under this chapter."[48]

What is notable with regard to both of these recipients is that the residential moves were made without any consultation with either of the recipient's guardians or Medicaid care coordinators. A court appointed guardian has full legal authority and responsibility to make legal, financial, and care decisions for their ward: "[a] full guardian of an incapacitated person has the same powers and duties respecting the ward that a parent has respecting an unemancipated minor child."[49] Part of a guardian's powers and duties include having "custody of the person of the ward" and the guardian is to ensure "that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety."[50] What this means is that Mr. Lowe's movement of the two recipients' residences without their prior approval deprived the guardian's right to select the recipients' residences. This was tantamount legally to moving a child without the parents' knowledge and consent. In addition, Medicaid Care Coordinators, who have an ongoing obligation to monitor their client's support plan, and to keep current with their client's services, and their status to determine if their

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46 7 AAC 130.218(c).
47 7 AAC 130.218(c)(6).
48 7 AAC 130.222.
49 AS 13.26.316(c).
50 AS 13.26.316(c)(1).

support plans require adjustment.[51] The recipient's physical location is an essential part of this requirement: is it acceptable to the recipient; does it meet their needs; does it support their independence as much as possible, etc.

The Medicaid regulations also require that a provider "protect a recipient's health, safety, and welfare while rendering a [Medicaid Waiver] service."[52] The two involved recipients have a history of behaviors that have resulted in both of them being incarcerated and institutionalized. They require a great deal of oversight and supervision as a result to keep their behaviors under control and keep them safe. Changing their residential environment without consultation with people who have responsibilities for their care, i.e., their guardians and care coordinators, could foreseeably result in them being placed in a less than optimal situation and place them at risk for exacerbated behaviors, which jeopardizes their "health, safety, and welfare."

Mr. Lowe's unilateral actions in changing two recipient's residence ran directly counter to his obligation, as a Medicaid provider, to participate in a "person centered practice" for these two recipients and jeopardized their "health, safety, and welfare." Accordingly, the Division's finding that Mr. Lowe violated these requirements is supported by a preponderance of the evidence.

b. Providing the Division with ALH Service Records (Division Findings, Allegation 2).[53]

Medicaid providers are required to maintain records documenting the services they provide to their recipients.[54] Upon the Division's request, they are to provide the Division with those records, or a copy at the Division's option.[55] If a provider does not comply with a records request, the Division "may consider the record to be nonexistent" and sanctionable.[56]

The evidence shows that the Division first requested the business's record from Mr. Lowe on November 4, 2022. He was unable to produce them and said he would provide them by 7 p.m. that night. He did not provide any records until November 7, 2022, where he provided some, but not all. He asked for an extension, stating that he had records on a flash drive.

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51 *See* the Division's *Care Coordination Services and Long Term Services and Supports Targeted Case Management Conditions of Participation*, which are incorporated by reference into regulation. 7 AAC 160.900(d)(34).

52 7 AAC 130.222(1).

53 Ex. B, pp. 5 – 6.

54 7 AAC 105.230.

55 7 AAC 105.240(a) and (b).

56 7 AAC 105.240(d).

On November 8, 2022, Mr. Lowe was able to provide the Division with very incomplete additional records. He then told the Division investigator that he thought the flash drive was in his Seattle apartment. In addition to his explanation about the flash drive, he has also stated that the missing records were due to computer issues and one of his Medicaid recipients destroying paper records. He indisputably did not provide the Division with the flash drive. The preponderance of the evidence therefore demonstrates that Mr. Lowe did not provide the Division with all the records documenting the services he provided to his Medicaid recipients despite the Division's request for those. Accordingly, the Division's finding on this point is supported by the evidence.

c. Failing to Keep Clients' Personal Health Information Confidential (Division Findings, Allegation 3).[57]

Medicaid recipients are entitled to have their personal health information kept confidential. Medicaid providers are required to comply with legal requirements to keep their clientele's personal health information private.[58]

The question is whether Mr. Lowe complied with that requirement. Mr. Lowe informed the Division that he had his residents' care records loaded on a flash drive. It is undisputed that Mr. Lowe has not been able to locate that flash drive. He thinks the flash drive might be in his Seattle apartment. He testified that the flash drive was password protected. The preponderance of the evidence therefore demonstrates that Mr. Lowe has misplaced his residents' care records. However, there is insufficient evidence to conclude that by the act of misplacing the records, that he has not kept recipient records confidential. The Division needed to show something more than Mr. Lowe not being able to locate records to demonstrate that confidentiality requirements were breached.

d. Compliance with Background Check Requirements ((Division Findings, Allegation 4).[59]

Individuals and businesses that must be licensed or certified by the Department, or that will be paid by the Department to provide services to individuals served by the Department's programs, are required to undergo a background check. The background check requirement includes a criminal history check and a check for barrier conditions, such as having been

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57 Ex. B, p. 7.
58 7 AAC 105.220(a)(1).
59 Ex. B, p. 8.

adjudicated as having abused or neglected a child or a vulnerable adult, among other conditions.[60] The background check requirement applies to owners of a business, its officers, directors, partners, members, and principals. It also applies to employees and independent contractors if those persons have regular contact with service recipients or their personal or financial records.[61] This background check is mandatory.[62] A Medicaid-enrolled provider may not have a person who has been convicted of a barrier crime or determined to have another barrier condition as an owner, officer, director, partner, member, principal, employee, or independent contractor of the business.[63]

A business entity that is subject to the background check requirement must request a background check for a prospective employee and the background check must be completed must be completed before hiring the employee.[64] Unless there is a more recent background check required by federal law, a background check is good for five years.[65] If a prospective employee with a current background check changes employment, the new employee must become associated with the new employer, and an employer is required to annually verify that each employee has a valid background check.[66]

The facts show that Mr. Lowe had a total of six employees with current background checks. However, it is undisputed that of those six, three, Saffie Faal Cham, Yusupha Lowe, and Matarr Saine, had current background checks, but they were not associated with Mr. Lowe's business. Mr. Lowe also identified Bekai Cole, who did not have a background check as being a care provider in his discussions with the Division on November 4, 2022. However, at hearing, Mr. Lowe testified that Mr. Cole had just arrived in Anchorage the evening before, was not a current employee at the time, and provided verification that Mr. Cole had flown into Anchorage late on November 3, 2022.

On its face, the evidence undisputedly shows that Mr. Lowe did not comply with the regulatory requirements that three of his employees, Saffie Faal Cham, Yusupha Lowe, and Matarr Saine, be associated with his business. Regarding Mr. Cole, given the documentation

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60 AS 47.05.300 – 330.
61 AS 47.05.300 - 310; 7 AAC 10.900(b).
62 7 AAC 10.910.
63 AS 47.05.310(a); 7 AAC 10.905.
64 7 AAC 10.910(a).
65 7 AAC 10.910(c).
66 7 AAC 10.910(b), (c)(4), and (d).

supplied by Mr. Lowe showing that Mr. Cole had just arrived in Anchorage on November 3, 2022 and Mr. Lowe's testimony, the evidence is insufficient to establish that Mr. Cole was an employee subject to the background check requirement even though Mr. Lowe told the Division he was an employee on November 4, 2022.

e. Receipt of Payment Without Support Documentation (Division Findings, Allegation 5).[67]

A Medicaid provider is required to maintain records to support its billings for Medicaid services.[68] And "[a] provider may not submit a claim" for payment unless it maintains those records.[69] If a Medicaid provider does not supply a copy of a record, after it is requested, the record "may [be] consider[ed] . . . to be nonexistent" and sanctionable.[70]

The evidence in this case shows that Mr. Lowe was requested by the Division to provide copies of his supporting records. He was only able to provide a very limited response, and was unable to provide most of them, although he maintained that he had them, albeit on a flash drive, which he was unable to locate. Accordingly, the missing records are considered to be nonexistent. And the evidence showed that Mr. Lowe billed the Division for approximately $700,000 for Medicaid services for which he did not have the records, and that he submitted billings after he was given a cease-and-desist order. The Division has therefore met its burden of proof on this point and established that Mr. Lowe billed it for services for which he did not maintain supporting documentation.

f. Maintenance of Employee Records (Division Findings, Allegation 6).[71]

A Medicaid provider is required by regulation to maintain records showing that its employees have completed CPR and first aid training, orientation training, training necessary to provide service to its Medicaid recipients, critical incident reporting training, medication management training as necessary, and restrictive intervention training.[72] It is undisputed that Mr. Lowe did not provide copies of those records to the Division despite it having requested them. Consequently, the Division has met its burden of proof on this point and established that Mr. Lowe has not complied with this regulatory requirement.

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67 Ex. B, p. 10.
68 7 AAC 105.230(a).
69 7 AAC 105.230(h).
70 7 AAC 105.240(d)(1).
71 Ex. B, p. 11.
72 *See* "Provider Conditions of Participation" § II B. Exs. E1, E2, and E3,

g. Failure to Renew Medicaid Certification (Division Findings, Allegation 7).[73].

A Medicaid provider is required to be enrolled as a Medicaid provider with the Department of Health prior to billing it for services provided to Medicaid recipients.[74] The Division has alleged, in its *Report of Investigation* dated November 30, 2022, that Mr. Lowe failed to renew his Medicaid provider certification. The facts of this case, as discussed in detail above, however, show that he started the renewal process on April 4, 2022. and while he was undeniably not responsive to the Division's multiple requests for the information necessary to process his application and given numerous extensions, his recertification application was not denied until November 30, 2022, the same day as the Division issued its *Report of Investigation.* And because Mr. Lowe requested this hearing to challenge not only the sanctions imposed in the Division's *Report* but to also challenge the denial of his recertification application, that denial is not effective unless and until a final decision is issued in this case upholding that denial. Accordingly, while the evidence shows that he undeniably delayed the processing of his recertification application, the Division did not establish that he failed to renew his Medicaid provider recertification.

h. Critical Incident Reporting (Division Findings, Allegation 8).[75]

Medicaid providers are required to report to the Division "no later than one business day after observing or learning of" a critical incident involving a Medicaid recipient.[76] The definition of a "critical incident" includes both "recipient behavior that resulted in harm to the recipient or others" and "an accident, an injury, or another unexpected event" that resulted in the recipient requiring medical evaluation or consultation.[77]

The evidence shows that Recipient 1 assaulted a staff member late the evening of November 9, 2022, which resulted in injuries to both the staff member and the recipient. The critical incident report was required to be filed no later than the next business day, which would have been November 10, 2022. However, the critical incident report was filed with the Division on November 11, 2022 at 7:44 a.m., a day late. In addition, that critical incident report

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73 Ex. B, p. 12.
74 7 AAC 105.210.
75 Ex. B, p. 13.
76 7 AAC 130.224(a)
77 7 AAC 130.224(c)1).

misrepresented the facts. It stated that the incident occurred on November 10, 2022 at 10:00 a.m. It omitted to mention that Ms. Cham was injured to the point of needing medical attention for injuries that were evident on November 18, 2022, over a week later.

The evidence therefore shows by a preponderance of the evidence that Mr. Lowe not only filed the requisite critical incident report a day late, but that he also misrepresented the facts supplied in that report. Accordingly, the Division has demonstrated that Mr. Lowe did not comply with the regulatory requirement that he filed a truthful[78] critical incident report in a timely manner.

i. Failure to Comply with State and Federal Requirements (Division Findings, Allegation 9).[79]

A Medicaid provider is required to comply with State and Federal requirements regarding the administration of the Medicaid program.[80] The "Provider Conditions of Participation" require that a provider maintain comprehensive liability and workers' compensation insurance coverage.[81] It is undisputed that Mr. Lowe did not have either for a substantial period of time. He was aware that he did not have liability insurance. However, he lost his workers' compensation insurance in July of 2022, and stated that he did not know that he had lost it until 2023. It should be noted that the Division's report of investigation, dated November 30, 2022, informs Mr. Lowe that he no longer had workers' compensation coverage. Mr. Lowe attributed the loss of that insurance to not receiving his mail because his staff placed in a location that he was unaware of. Regardless of the causation, the evidence is clear that he failed to comply with this regulatory requirement. The loss of his workers' compensation insurance is especially noteworthy because one of his staff was injured by a recipient when there was no workers' compensation coverage.

Based solely on his failure to maintain general liability and workers' compensation insurance, the Division has shown that Mr. Lowe violated the regulatory requirement that he adhere to State and Federal requirements regarding the administration of the Medicaid program. It is also noteworthy that Mr. Lowe paid his staff in cash, meaning that no taxes were taken out of their pay, and no payments made to the unemployment insurance fund on their behalf. While

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78 Although the critical incident reporting regulation, 7 AAC 130.244, does not explicitly state that the report must be truthful, it can be reasonably construed to include that requirement.

79 Ex. B, p. 14.

80 7 AAC 105.210(b)(3).

81 See "Provider Conditions of Participation" § I C(1)(a). Exs. E1, E2, and E3.

this is not an explicit requirement of the Medicaid program, it underscores a general lack of compliance with both federal tax law and state labor laws.

2. Sanctionable Offenses.

The Division is allowed to impose sanctions against Medicaid providers, which can range from requiring mandatory education classes to termination from participation in the Medicaid program.[82] There are a wide variety of sanctionable offenses against the Medicaid program.[83] The Division alleged that Mr. Lowe had committed nine sanctionable violations against the Medicaid program. As discussed in detail above, the Division established, by a preponderance of the evidence, that Mr. Lowe committed seven violations (allegations 1, 2, 4, 5, 6, 8, 9) of the Medicaid program requirements.

a. Allegation 1.

This allegation, which was found to be supported by the evidence, was that Mr. Lowe had violated the Person-Center Practice and Recipient Safeguards requirements. Specifically, the change of two residents' place of residence without consultation or informing those residents' guardians and Medicaid Care Coordinators violated two regulatory requirements. The first was that the recipients' support plans reflect their chosen residence. Given that both recipients have guardians, they would be the ones to choose the recipient's residence. In addition, the move without the knowledge or consent of the guardians, or informing the Medicaid Care Coordinators, jeopardized the recipients' health, safety, and welfare. This is a sanctionable offense under 7 AAC 105.400(10), "violating any provision of AS 47.07 or any regulation adopted under it."

b. Allegation 2.

This allegation was that Mr. Lowe had failed to maintain and provide the Division with copies of his recipient's service records. As discussed above, the Division demonstrated that Mr. Lowe, despite the Division's request, only provided it with a very incomplete service records, which in turn allows the Division to consider the missing records as being nonexistent. This is a sanctionable offense under 7 AAC 105.400(4), "failing to disclose or make available to the department records of service provided to Medicaid recipients," 7 AAC 105.400(28), "failing to submit business records, medical records, or other information required by the department for the

[82] 7 AAC 410(a).
[83] 7 AAC 105.400.

administration of the Medicaid program," and 7 AAC 105.400(41), "failing to maintain for each recipient . . . a contemporaneous and accurate record of the services provided."

c. Allegation 4.

This allegation was that Mr. Lowe failed to comply with background check requirements. As discussed above, Mr. Lowe had three employees who had current background checks. However, they were not associated with his business, which is required by the applicable Medicaid regulations. This constitutes a sanctionable offense under 7 AAC 105.400(30), "failing to comply with the requirements of AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990 (barrier crimes and conditions; background checks)."

d. Allegation 5.

This allegation was that Mr. Lowe failed to comply with the regulatory requirement that he not submit a Medicaid billing claim without having supporting documents. As discussed above, he violated that requirement. This is a sanctionable offense under 7 AAC 105.400(10), "violating any provision of AS 47.07 or any regulation adopted under it." In addition, he submitted billings after having been issued a cease-and-desist order, which is a sanctionable offense under 7 AAC 105.400(6), "engaging in a course of conduct or performing an act the department considers deceptive or abusive of the Medicaid program or continuing that conduct following notification it should cease." While it is also arguable that this could also be a sanctionable offense under 7 AAC 105.400(1), "presenting or causing to be presented for payment any false or fraudulent claim for service or services," the evidence does not show active fraud, but instead missing records.

e. Allegation 6.

This allegation was that Mr. Lowe failed to comply with the regulatory adopted "Provider Conditions of Participation," which required that he maintain records of his employees having completed a number of mandatory trainings such as CPR and first aid. As discussed above, he violated that requirement. This is a sanctionable offense under 7 AAC 105.400(10), "violating any provision of AS 47.07 or any regulation adopted under it."

f. Allegation 8.

This allegation was that Mr. Lowe late filed a critical incident report, which contained factual misrepresentations. As discussed above, he violated the regulatory requirements for

filing a critical incident report. This is a sanctionable offense under 7 AAC 105.400(10), "violating any provision of AS 47.07 or any regulation adopted under it."

g. Allegation 9.

This allegation was that Mr. Lowe failed to comply with federal and state requirements, due to his failure to maintain legally required insurance for his business. As discussed above he violated that requirement. This is a sanctionable offense under 7 AAC 105.400(10), "violating any provision of AS 47.07 or any regulation adopted under it."

3. Imposition of Sanctions

As provided immediately above, Mr. Lowe has committed seven sanctionable offenses against the Medicaid program. The issue that needs to be resolved is what level of sanction, if any, should be assessed against him. The Division has requested that three sanctions be imposed: "termination from participation in the Medicaid program," "referral for fiscal audit under 7 AAC 160.110," and "public notice of suspension or termination of a provider."[84]

The department, by regulation, is to consider the following factors when arriving at a sanction:

> (b) The department will consider the following factors in determining the sanction to be imposed:
>
> (1) seriousness of the offense;
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> (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.[85]

The established allegations in this case do not involve factors 5 and 8 ("prior provision of provider education" and "actions taken or recommended by peer-review groups or licensing boards"). Accordingly, they will not be addressed. Mr. Lowe did have a sanction imposed

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[84] 7 AAC 105.410(a)(1), (a)(10), and (a)(11).

[85] 7 AAC 105.420(b).

against him in 2011, based upon the Division's finding of violations. However, he appealed that sanction, and the parties resolved that case without going to hearing by an agreement where he agreed to surrender his assisted living home license. Notably, that written agreement does not contain any admissions by Mr. Lowe, meaning that the Division did not establish prior violations or an imposed sanction. Further, per Mr. Holden's testimony, the Division was unaware of and not take this prior action into account when it determined what sanctions it thought should be appropriate.[86] Accordingly, factors 3 and 4 ("history of prior violations" and "prior imposition of sanctions") will not be addressed.

The sanction factors to be addressed are therefore factor 1- "seriousness of the offense," factor 2 - "extent of the violations," factor 6 – "provider willingness to obey program rules," and factor 7 - "whether a lesser sanction will be sufficient to remedy the problems. Each of these are addressed as follows:

a. Factor 1 – "Seriousness of the offense."

The Division has proven that Mr. Lowe moved the residences of two of its high-risk residents without consultation or prior notification of their guardians or Medicaid Care Coordinators.[87] Indeed only one guardian was informed of the move after it occurred. The other guardian and the two Medicaid Care Coordinators did not know about the move until the Division investigator informed them of it. This is a very serious offense. The guardians are legally responsible for their wards' care and oversight. Without knowing of their ward's whereabouts, they cannot fulfill those obligations. The Medicaid Care Coordinators similarly have responsibilities for monitoring and assessing their clients' care needs. Without knowing of their ward's whereabouts, they cannot fulfill those responsibilities.

The Division has proven that Mr. Lowe did not provide it with its client's service records, which are deemed nonexistent.[88] This is an exceedingly serious offense for two reasons. First, a Medicaid provider has an absolute duty to provide those records to the Division upon request. Second, those records are required to support the provider's billings to Medicaid, and a "provider may not support a claim" for payment without maintaining those records.[89] By the Division's

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86 Mr. Holden's testimony.
87 Allegation 1.
88 Allegations 2 and 5.
89 7 AAC 105.320(h).

estimate, Mr. Lowe has billed the Division for approximately $700,000 without having supporting records.

The Division has proven that Mr. Lowe did not comply with background check requirements for three of his employees.[90] While those three employees had current background checks, they were not "associated" as provider with Mr. Lowe's business as required by the Medicaid regulations. Instead, they were either not associated with any business or with a different employment. This is a serious offense, but not quite as serious as if they did not have a current background check.

The Division has proven that Mr. Lowe failed to maintain his employee records to demonstrate that they had fulfilled required orientation training, critical medical training (CPR, first aid, medication management) and incident management (critical incident reporting, restrictive interventions) for its vulnerable clientele.[91] This is a very serious offense given that these trainings are essential to assure that the care providers have the necessary skills to provide care for this vulnerable clientele.

The Division has proven that Mr. Lowe late filed a critical incident report that misstated the facts.[92] This is an exceedingly serious offense, because although the report was only a day late, it misstated the date of the incident, minimized the incident, and did not report that one of the employees, other than Mr. Lowe, was injured enough to require medical care.

The Division has proven that Mr. Lowe did not maintain general liability insurance or workers' compensation insurance.[93] This is an exceedingly serious offense given that Mr. Lowe's residents are high risk and vulnerable, and the risk of injury to themselves and others, as demonstrated by the critical incident on November 9, 2022, where a resident, Mr. Lowe, and an employee were injured.

b. Factor 2 – "Extent of Violations."

The evidence shows that the violations were widespread and pervasive. They ranged from Mr. Lowe's failure to associate employees who had a current background check with his business, to a disregard of his obligations to the guardians and Medicaid Care Coordinators regarding two recipient's residences, to a wholesale disregard of his obligations to maintain and

[90] Allegation 4.
[91] Allegation 6.
[92] Allegation 8.
[93] Allegation 9.

provide copies of training records for the employees, to maintaining and providing recipient care records to document their care and his billings to Medicaid. In addition, he failed to maintain both general liability and workers' compensation insurance. Further, he misstated the facts on a critical incident report, not only misstating the date of the occurrence but omitting to mention an injury to a staff member that required medical attention.

c. Factor 6 - "Provider willingness to obey program rules,"

The evidence, in this case, demonstrates that Mr. Lowe operates with a complete disregard for documentation and other legal requirements, which is demonstrated by his failure to maintain and provide recipient records and employee training records, his failure to associate his employees who require background checks with his business, and by the his failure to complete his provider certification renewal despite being given numerous extensions. The evidence further shows that he is not willing to comply with baseline insurance requirements and misstated the facts on a critical incident report. It is highly probative that Mr. Lowe was issued a cease-and-desist order to not file Medicaid claims without supporting documentation, and continued to file payment claims thereafter. The evidence therefore shows that Mr. Lowe is unwilling to obey program rules.

d. Factor 7 - "Whether a lesser sanction will be sufficient to remedy the problem."

The Division found that three sanctions were appropriate: "termination from participation in the Medicaid program," "referral for fiscal audit under 7 AAC 160.110," and "public notice of suspension or termination of a provider."[94]

The Division's estimate is that Mr. Lowe's business had approximately $700,000 in what the Division maintains are unsupported billings and that he was unable to provide more than a very limited response to the Division's request for his records. Given the passage of time, that figure may be substantially greater than $700,000. The only way to resolve the issue of whether Mr. Lowe has been properly paid by Medicaid is through a comprehensive fiscal audit. Accordingly, no lesser sanction would be sufficient on this issue.

The Division found that Mr. Lowe should be sanctioned by termination from participation in the Medicaid program. A review of the evidence shows that Mr. Lowe simply chose to disregard, not just one of his operational requirements, but a large number of them.

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[94] 7 AAC 105.410(a)(1), (a)(10), and (a)(11).

Given the totality of his violations and their seriousness, as discussed above, on critical areas: employee training and documentation, recipient safety (moving residences without consent or knowledge of guardians and Medicaid Care Coordinators), background check full compliance, one instance of critical incident misreporting, failure to maintain essential insurance, and virtually non-existent patient care records necessary to support Medicaid billing and a lack of cooperation with the Division, suspension or a period of probation or supervision would more likely than not be insufficient to rectify Mr. Lowe's careless, if not reckless and intentional, disregard of programmatic requirements. While the evidence shows that Mr. Lowe provides exemplary care for a vulnerable high-risk clientele, his actions have placed his clients and his staff at risk, for example not carrying general liability or workers' compensation insurance. Further his lack of compliance with record keeping requirements while billing the Medicaid program, demonstrates an inability or unwillingness to comply with financial program requirements. In addition, he continued to bill the Medicaid program after having been issued a cease-and-desist order, which supports a conclusion that he would not comply with a lesser sanction. Accordingly, the sanction of termination is supported by a preponderance of the evidence.

The last sanction found by the Division was public notice of his termination. This is highly appropriate. This is not a questionable case. The public should be on notice of his termination, both as a deterrent to other Medicaid providers, but also to protect the public.

IV. Conclusion

The Division had the burden of proof in this case by a preponderance of the evidence. It has met its burden, and as a result:

A. The denial of Mr. Lowe's Medicaid Provider certification renewal application is AFFIRMED.

B. The sanctions found by the Division terminating Mr. Lowe from participation as a Medicaid provider, requiring a fiscal audit, and issuing a public notice of his termination from participation as a Medicaid provider, are AFFIRMED.

DATED: July 27, 2023.

Signed

Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health, 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 8th day of September, 2023.

Signed
By: _____
Name: Laura O. Russell
Title: Senior Behavioral Health Policy Advisor

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