

HOLMES WEDDLE & BARCOTT, PC

701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Jahna M. Lindemuth
Alaska Bar No. 97111068
Scott M. Kendall
Alaska Bar No. 0405019
Holmes Weddle & Barcott, P.C.
701 West 8th Avenue, Ste. 700
Anchorage, AK 99501
Phone: 907.274.0666
Fax: 907.277.4657

Attorneys for Plaintiff Alaska State Hospital and Nursing Home Association

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE HOSPITAL AND
NURSING HOME ASSOCIATION, an
Alaska non-profit corporation,

Plaintiff,

v.

STATE OF ALASKA, DEPARTMENT
OF HEALTH AND SOCIAL
SERVICES,

Defendant.

Case No. 3AN-19-0244 CI

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff Alaska State Hospital and Nursing Home Association (“ASHNHHA”), an Alaska non-profit corporation, by and through counsel of record, Holmes Weddle & Barcott, P.C., hereby sets forth its complaint against Defendant State of Alaska, Department of Health and Social Services (“DHSS”), by stating and alleging the following:

I. BACKGROUND

1. This is a civil action brought by Plaintiff, ASHNHA, pursuant to AS 44.62.300 against Defendant, DHSS, seeking to set aside, invalidate, and enjoin the Complaint for Declaratory Judgment
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FILED
STATE OF ALASKA
THIRD DISTRICT

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CLERK OF THE TRIAL COURTS

BY _____
DEPUTY CLERK

HOLMES WEDDLE & BARCOTT, PC

701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

enforcement of emergency regulations promulgated by DHSS via AS 44.62.250, as well as proposed permanent regulations making the emergency regulations permanent. The emergency regulations, published on Friday June 28, 2019 purported to impose across the board rate cuts on medical providers and facilities for all Medicaid services rendered on or after Monday July 1, 2019. DHSS has given notice that it intends to make the changes in the emergency regulations final and permanent following a 90-day notice and comment period.

2. ASHNIHA alleges that DHSS acted in violation of state and federal law by promulgating rate changes through emergency regulations in violation of both state and federal law.

3. In addition to setting aside and enjoining the enforcement of the emergency regulations, ASHNIHA requests that this court also provide declaratory relief in the form of an order declaring that DHSS is prohibited from imposing rate reductions via emergency regulation and that rates can be changed through the standard regulation process only after (1) DHSS has submitted evidence to the Center for Medicare and Medicaid Services (“CMS”) that the rates change can be made without impacting the efficiency, economy, quality of care and access to case as required by the Medicaid Act, (2) CMS has approved a State Plan Amendment (“SPA”) that includes the new rates, and (3) in the case of facility rates, the legislature has amended AS 47.07.070, which requires that facility rates be based on the “reasonable costs related to patient care.”

II. PARTIES

4. Plaintiff ASHNHA is a nonprofit corporation formed under Alaska law. It represents more than 65 hospitals, nursing homes and other healthcare organizations who employ over 10,000 Alaskans. ASHNHA represents both small rural hospitals and large hospital systems across the state. For over 60 years ASHNHA and its members have worked to improve healthcare in Alaska, including improving access, care, and value.

5. Defendant DHSS is the state department charged, generally, with promoting and protecting the health and well-being of Alaskans. Pursuant to that duty, DHSS is the single state agency designated to administer or supervise the administration of the Medicaid program under title XIX of the Social Security Act ("Medicaid Act").

III. JURISDICTION AND VENUE

6. This court has original jurisdiction of this action pursuant to AS 22.10.020 because this is a civil action seeking injunctive and declaratory relief. Additionally, this court has original jurisdiction pursuant to AS 44.62.300 because this action seeks to declare regulations invalid.

7. Venue is proper in the Third Judicial District under Alaska R. Civ. P. 3(c)(2) because Defendant DHSS's Commissioner, Adam Crum, may be personally served in the Third Judicial District. Venue is also proper under Alaska R. Civ. P. 3(c)(1) because Plaintiff ASHNHA's claims arise from actions that will take place, in part, in the Third Judicial District.

IV. FACTUAL ALLEGATIONS

8. ASHNHA's members are medical provider organizations who are subject to the Medicaid reimbursement rate cuts announced on June 28, 2019 by DHSS and imposed beginning on July 1, 2019.

9. According to the most recent information provided by DHSS, as of June 30, 2019: 215,817 total Alaskans are covered by Medicaid, nearly 30% of Alaska's total population. Of that number, 93,946 are children aged 18 years of age or less.

10. On June 28, 2019 Governor Mike Dunleavy line item vetoed approximately \$444 million from the Fiscal Year 2020 budget provided to him by the Alaska Legislature. Within those vetoes, Governor Dunleavy specifically reduced the amount of Medicaid funding available to DHSS by \$77 million. Of that reduction, \$27 million was due to the elimination of adult dental coverage and \$50 million was a further reduction in overall Medicaid funding.

11. It is believed that Governor Dunleavy intended through this \$77 million veto to only veto \$58 million in general fund dollars and \$19 million from federal match dollars. However, Governor Dunleavy has vetoed the full \$77 million from general fund dollars, costing the state in excess of \$40 million additional federal match dollars.¹ The net result of this action by Governor Dunleavy is a reduction of \$117 million to pay for Medicaid services in Alaska.

¹ The additional \$19 million would have leveraged an additional \$40 million based on the traditional 30/70 general fund/federal match percentage or "FMAP".

12. Also on June 28, 2019, DHSS adopted, as emergency regulation, changes to Title 7 of the Alaska Administrative Code dealing with reimbursement rates for Medicaid services. Specifically, DHSS's emergency regulations suspend inflation-based payment rate increases while also imposing a 5% across the board cut to reimbursements for fiscal year 2020. Fiscal year 2020 began on July 1, 2019, giving providers three days effective notice over a weekend.

13. The "Finding of Emergency" signed by Commissioner Crum for each set of emergency regulations provides as the sole reason for the emergency regulation that the costs of providing Medicaid services in Alaska "will exceed the amount allocated in the state budget for fiscal year 2020. The Medicaid program, one of the largest components in the state budget, will be significantly underfunded in fiscal year 2020."

14. Given the simultaneous nature of Governor Dunleavy's line-item vetoes and Commissioner Crum's "Finding of Emergency" it appears that the underfunding causing this emergency is not an "emergency" at all. This underfunding is an occurrence entirely of the Dunleavy Administration's own deliberate creation.

15. On or before July 5, 2019 DHSS proposed to make these emergency regulations permanent prior to their expiration on October 28, 2019.

16. For facilities, rate cuts and inflationary freezes such as those imposed by the emergency regulations result in reimbursement below the reasonable cost of services as required in AS 47.07.070.

17. Some types of providers can shift those cost overruns to other payers. Other providers with thin financial margins or a high ratio of Medicaid patients cannot do so.

Accordingly, the reductions imposed will cause reduction in the medical services available to community and/or the actual closure of provider facilities.

V. CLAIMS FOR RELIEF

COUNT I

(Violation of AS 44.62.250 & .270)

18. Plaintiff incorporates paragraphs 1 through 17, above, by reference.

19. Alaska Statute 44.62.250 requires, in part, that an emergency regulation can only be promulgated where “necessary for the immediate preservation of the public peace, health, safety, or general welfare” of the state.

20. Alaska Statute 44.62.270 provides that “emergencies are held to a minimum and are rarely found to exist.”

21. The Dunleavy Administration, of which DHSS is a part, has intentionally attempted to create a false emergency by vetoing large amounts of Medicaid funding provided to it by the Alaska Legislature.

22. The Dunleavy Administration, of which DHSS is a part, has apparently accidentally caused itself to lose an additional approximately \$40 million in federal matching (FMAP) Medicaid funds by unintentionally or negligently vetoing approximately \$17 million of general fund money rather than federal.

23. Plaintiffs are entitled to a declaration that under these circumstances no bona fide emergency exists under AS 44.62.250 and .270.

24. Plaintiffs are further entitled to injunctive relief invalidating, and staying the enforcement of, the emergency regulations announced on June 28, 2019.

COUNT II
(Violation of 42 U.S.C. § 1396a(a)(30)(A) & AS 47.07.070)

25. Plaintiff incorporates paragraphs 1 through 24, above, by reference.

26. Federal law, at 42 U.S.C. § 1396(a)(30)(A) requires, in part, that DHSS study the efficiency, economy, quality of care, and access to care impacted by any Medicaid rate reductions before implementation. DHSS has not done so relative to the rate reductions in the emergency and proposed permanent regulations.

27. Federal law, at 42 U.S.C. § 1396(a)(30)(A) requires, in part, that DHSS go through a State Plan Amendment process before implementing any Medicaid rate reductions. DHSS has not gone through the State Plan Amendment relative to the proposed rate reductions in the emergency and proposed permanent regulations.

28. State law, at AS 47.07.070, requires that Medicaid rates for facilities must be based on “reasonable costs related to patient care.” The rate changes for facilities imposed via the emergency and permanent regulations are inconsistent with payment based on the “reasonable costs related to patient care” and therefore violate the statute.

29. Plaintiffs are entitled to a declaration that the emergency regulations and proposed permanent regulations violate 42 U.S.C. § 1396(a)(30)(A) and AS 47.07.070 and that the rate reductions imposed via both the emergency and permanent regulations are unlawful.

30. Plaintiffs are entitled to a declaration that DHSS can change rates through the standard regulation process only after (1) DHSS has submitted evidence to the Center for Medicare and Medicaid Services (“CMS”) that the rates change can be made without

impacting the efficiency, economy, quality of care and access to care as required by the Medicaid Act, (2) CMS has approve a State Plan Amendment (“SPA”) that includes the new rates, and (3) in the case of facilities, the legislature has amended AS 47.07.070, which currently requires that rates be based on the “reasonable costs related to patient care.”

31. Plaintiffs are further entitled to injunctive relief invalidating, and staying the enforcement of both the emergency regulations announced on June 28, 2019 and the proposed permanent regulations announced on July 5, 2019.

**COUNT III
(Regulations are Arbitrary and Unreasonable)**

32. Plaintiff incorporates paragraphs 1 through 31, above, by reference.

33. The Court shall invalidate a regulation where it is arbitrary and unreasonable.

34. In promulgating the emergency and permanent regulation DHSS failed to account for or even consider efficiency, economy, quality of care and access to care as required by the Medicaid Act, and in the case of facilities, the “reasonable costs related to patient care” as required by AS 47.07.070. These failures violate both state and federal law as described above. The Medicaid rate reductions proposed in the emergency and proposed permanent regulations are accordingly invalid because they are unreasonable and arbitrary.

35. Plaintiffs are entitled to a declaration that because DHSS’s promulgation of the rate reductions is unreasonable and arbitrary the emergency and proposed permanent regulations are invalid.

36. Plaintiffs are further entitled to injunctive relief invalidating, and staying the enforcement of both the emergency regulations announced on June 28, 2019 and the permanent regulations announced on July 5, 2019.

COUNT IV

(Violation of Due Process, Alaska Constitution Article I, §7)

37. Plaintiff incorporates paragraphs 1 through 36, above, by reference.

38. The Alaska Constitution's Due Process clause, Article I § 7, applies to administrative actions.

39. There is a State Plan Amendment ("SPA") process proscribed by law that includes a notice and comment opportunity in the setting of Medicaid reimbursement rates under both state and federal law.

40. The SPA process also includes the Center for Medicaid Services ("CMS") making a finding, based on that process, that a rate reduction is "consistent with efficiency, economy, and quality of care" under 42 U.S.C. § 1396(a)(30)(A). As a matter of law, DHSS must go through this process prior to beginning an administrative process to change rates.

41. In bypassing this process and changing the Medicaid reimbursement rates through an emergency regulation process, DHSS has violated due process.

42. Plaintiffs are entitled to a declaration that DHSS's promulgation of the rate reductions imposed via both the emergency and permanent regulations violates due process under the Alaska Constitution.

43. Plaintiffs are further entitled to injunctive relief invalidating, and staying the enforcement of both the emergency regulations announced on June 28, 2019 and the permanent regulations announced on July 5, 2019.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests relief as follows:

- A. For an injunction against DHSS, invalidating and staying the enforcement of both the emergency regulations announced on June 28, 2019 and the proposed permanent regulations announced on July 5, 2019.
- B. For an order declaring that no emergency exists under AS 44.62.250 & .270 to justify the emergency regulations announced on June 28, 2019.
- C. For an order declaring that both the emergency regulations announced on June 28, 2019 and the proposed permanent regulations announced on July 5, 2019 are unreasonable and arbitrary, in violation of state and federal law, and in violation of the Alaska Constitution's Due Process Clause.
- D. For an order declaring that any change to Medicaid rates must follow the process required by state and federal law, and declaring that—if DHSS plans to set facility rates in a manner that does not base reimbursement on the reasonable cost of patient care—the relevant Alaska statutes must first be changed to allow DHSS to do so.
- E. For reasonable costs and attorneys' fees incurred by Plaintiff in this action as allowed by law; and
- F. For any further relief as the court deems equitable and appropriate.

HOLMES WEDDLE & BARCOTT, PC

701 WEST EIGHTH AVENUE, SUITE 700

ANCHORAGE, AK 99501-3408


TELEPHONE (907) 274-0666

FACSIMILE (907) 277-4657

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 11th day of July
2019.

HOLMES WEDDLE & BARCOTT, PC
Attorneys for Plaintiff Alaska State Hospital
and Nursing Home Association

By: _____


Jahya M. Lindemuth

Alaska Bar No. 97111068

Scott M. Kendall

Alaska Bar No. 04050119

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