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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KOOTENAI MEDICAL CENTER (re J.R.M.), *Appellant*, vs. **IDAHO DEPARTMENT OF HEALTH AND WELFARE,** *Respondent*.	Case No. **CV 2008 8202** **MEMORANDUM DECISION AND ORDER ON APPEAL**

I. INTRODUCTION AND BACKGROUND.

J.R.M. was a 17-year-old girl when she was treated as an inpatient at the North Idaho Behavioral Health (NIBH) unit of appellant Kootenai Medical Center (KMC) from March 11, 2007, to March 21, 2007, as a result of her having taken a massive overdose of prescription medications. A.R. 14, p. 10, pp. 36-28. On March 11, 2007, upon admission for that overdose, NIBH diagnosed J.R.M. with "depression." *Id.,* p. 43. J.R.M. had a history of depression and had a history of potentially lethal pharmaceutical overdoses in the five-year period just before this hospitalization at NIBH. *Id.,* p. 36. An overdose in 2006 resulted in four months of acute psychiatric hospitalization and inpatient residential treatment. *Id.* A few weeks before her March 11, 2007, hospitalization at NIBH, J.R.M. had moved from Alaska to be with her sister in Moscow, Idaho. *Id.* Just after moving in with her sister, J.R.M. was physically and sexually

assaulted by a 21 year old male. *Id.,* p. 40. On March 15, 2007, NIBH staff reported that physical and sexual abuse to the Moscow Police Department. *Id.,* p. 99.

NIBH applied for Medicaid reimbursement for the entire length of J.R.M.'s stay, March 11, 2007, to March 21, 2007. On September 4, 2007, Qualis, the subcontractor who makes reimbursement determinations for the respondent Idaho Department of Health and Welfare (IDHW), issued a Retrospective Partial Certification Notice approving reimbursement from March 11, 2007, to March 15, 2007, and denying reimbursement for the remainder of the hospitalization period, the last six days from March 16, 2007, to March 21, 2007. NIBH requested reconsideration and on September 20, 2007, Qualis upheld its earlier decision in an "Upheld Appeal Notice", which stated:

> After review of the clinical information submitted, our psychiatric peer consultant has advised that your admission to the hospital was medically necessary to stabilize and treat your condition. However, your condition appears to have stabilized and care could have been provided in a less acute setting as of March 16, 2007.

A.R. 14, pp. 8-9. On October 18, 2007, NIBH appealed and a hearing before Hearing Officer Susan Servick (Servick) was held on June 5, 2008. Tr.; A.R. 1. Servick affirmed the entirety of Qualis' decision on June 25, 2008. A.R. 6, pp. 1-33. NIBH then appealed Servick's decision to the Director of IDHW, and on October 6, 2008, the Director affirmed Servick's and Qualis' decisions in their entirety. A.R. 2, p. 1, *et. seq.*

On October 15, 2008, NIBH filed its Petition for Judicial Review now before this Court. A.R. 3, pp. 1-3. IDAPA 16.05.03.152. The present petition for judicial review has some parallels with three decisions previously simultaneously decided by this Court in *Kootenai Medical Center v. Idaho Dep't. of Health and Welfare,* CV 2006 9412, CV 2007 117, CV 2007 2103 (Kootenai County Dist. Ct. Oct. 30, 2007). Both parties have

informed this Court that the IDHW has taken that decision up on appeal to the Idaho Supreme Court, that the appeal has been argued and a decision is pending. Counsel for the IDHW requested this Court read District Judge Charles W. Hosack's October 17, 2008, Memorandum Opinion on Appeal in *Kootenai Medical Center, re: Elviis B., v. Idaho Department of Health and Welfare,* Kootenai County Case No. CV 2007 6418. This Court has read that decision.

II. ISSUES ON APPEAL.

NIBH only raises the issue that the stated basis for denial, that care could have been provided in a less acute setting as of March 16, 2007, was unsupported by the evidence and refuted by NIBH's witness. NIBH stated the issue on appeal is: "Did the Department of Health and Welfare's designated hearing officer and the Department of Health and Welfare Director err in affirming the Department's determination to deny payment to the Petitioner for J.M.'s hospital stay[?]" A.R. 3, pp. 1-3; Petition for Judicial Review, p. 2. NIBH requested attorney fees on appeal under I.C. § 12-117(1). Petitioner's Brief on Appeal, p. 2. IDHW frames the issues as:

> 1. Whether the Preliminary and Final Orders were supported by substantial evidence in the record as a whole.
> 2. Whether the substantial rights of KMC were prejudiced by IDHW's decision to deny payment for a portion of the stay.
> 3. Whether IDHW is entitled to attorney's fees and costs.

Response to Petitioner's Brief on Appeal, p. 4. Both parties submitted memoranda on appeal which this Court has reviewed. Oral argument was presented on April 30, 2009, following which this Court took the matter under advisement.

In NIBH's opening brief on appeal, NIBH raised for the first time on appeal the fact that NIBH on November 11, 2008, filed a Motion to Disqualify Hearing Officer Servick, on the ground that Servick was employed as an attorney for the Department of

Health and Welfare in nearly sixty separate matters at the time of the June 5, 2008, hearing. Petitioner's Brief on Appeal, pp. 3-4. At oral argument, it was claimed to be over one hundred separate matters. NIBH's motion to disqualify came *after* Servick had issued her decision in this matter, and NIBH noted that apparently Servick deemed herself without jurisdiction over matters upon which she had already ruled, such as in the present case. *Id.,* p. 4. Counsel for NIBH informed this Court that Hearing Officer Servick is disqualifying herself in appeals that were still pending before her. This Court has not been asked in this Petition for Review to determine any conflict of interest.

III. STANDARD OF REVIEW.

When reviewing an appeal from an agency decision, the court should place great weight on the agency's interpretation of its own rules. *Angstman v. City of Boise,* 128 Idaho 575, 917 P.2d 409 (1996). An agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Price v. Payette County Bd. Of Com'rs,* 131 Idaho 426, 958 P.2d 583 (1998). "Substantial evidence" which supports an agency's factual determination is "relevant evidence that a reasonable mind might accept to support a conclusion." *Pearl v. Bd. Of Professional Discipline of Idaho State Bd. Of Medicine,* 137 Idaho 107, 44 P.2d 1162 (2002).

Under the Idaho Administrative Procedures Act (IDAPA), a court shall affirm an agency's decision on appeal unless "substantial rights of the appellant have been prejudiced" or the court finds that the agency's findings, inferences, conclusions, or decisions are:

a) in violation of constitutional or statutory provisions;
b) in excess of statutory authority of the agency;

c) made upon unlawful procedure;
d) not supported by substantial evidence on the record as a whole; or
e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3)-(4).

There is limited Idaho case law defining "arbitrary" and "capricious." However, *Brett v. Eleventh Street Dock Owners*, 141 Idaho 517, 112 P.3d. 805 (2005) provides guidance. In *Brett*, the Court found that the IDL's decision was not arbitrary and capricious since it was "sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision… based on substantial evidence in the record." *Id*., 141 Idaho 517, 523, 112 P.3d 805, 811.

Where a state Medicaid law conflicts with a specific federal Medicaid law, the federal law will preempt the state law. 79 Am.Jur.2d, Welfare Laws, § 35; *Martin ex rel. Hoff v. City of Rochester,* 642 N.W.2d 1 (Minn. 2002).

IV. ANALYSIS.

A. Whether the Preliminary and Final Orders were Supported by Substantial Evidence and State and Federal Law, and Whether NIBH's Substantial Rights were Prejudiced.

1. Admission of Evidence by the Unnamed Physician Was Error.

NIBH argues Hearing Officer Servick improperly admitted into the record evidence of the conclusions and opinions of an unnamed physician, despite Servick having concluded that the evidence was not persuasive and therefore had not formed a basis for her findings. Petitioner's Brief on Appeal, p. 11. In response, IDHW argues the applicable Federal regulations and Supreme Court case law, providing for the due process right to an opportunity to cross-examine witnesses, were intended to ensure due process protections to medical assistance recipients, not providers. Response to Petitioner's Brief on Appeal, p. 5. IDHW goes on to argue that, even if NIBH were entitled to the due process protections envisioned in *Goldberg v. Kelley*, 397 US 254

(1970)and 42 CFR § 431.200, *et seq.,* NIBH would nevertheless not be permitted to cross-examine a peer reviewer in a Medicaid reimbursement decision hearing. Response to Petitioner's Brief on Appeal, p. 7, quoting *Featherston v. Stanton,* 626 F.2d 591 (7th Cir.). IDHW argues a peer-reviewer making a reimbursement decision is not an adverse witness, NIBH has not provided any evidence that the peer-reviewer was not impartial, and federal law requires Qualis and IDHW to keep the reviewing psychiatrist's identity confidential. Response to Petitioner's Brief on Appeal, p. 8.

This Court has previously analyzed this issue. In this Court's Memorandum Decision and Order on Appeal in Kootenai County Case numbers CV 2006 9412, CV 2007 117, and CV 2007 2103, the Court noted that *Goldberg* dealt with recipients, but also noted nothing in *Goldberg* precluded application to providers. This Court stated:

> [T]his Court agrees that IDHW cannot avoid the federal constitutional and statutory requirements of due process simply because the party pursuing this action is the health care *provider* rather than the *patient*. Practical considerations mandate this as well. The provider is in the better position financially to pursue reimbursement, and appeal if denied. By applicability definition, the Medicaid patient lacks financial resources. The provider has the resources to litigate such a claim. The provider is in the position to have medical records and is able to "navigate" the reimbursement system. The Medicaid patient lacks these things. The provider has a financial incentive to fully litigate reimbursement and stands to gain additional reimbursement if the provider is correct in its position. If the provider was prohibited from bringing such an appeal, the providers may decide in the future to not accept Medicaid patients. That would produce an untenable situation for this and any other community.

Kootenai Medical Center v. Idaho Dep't. of Health and Welfare, CV 2006 9412, CV 2007 117, CV 2007 2103 (Kootenai County Dist. Ct. Oct. 30, 2007), at pp. 10-11 (emphasis in original). (hereafter *KMC,* CV 2006 9412, CV 2007 117 and CV 2007 2103). Federal regulation 42 CFR 431.205(d) provides that a hearing system must meet the due process standards set forth in *Goldberg,* "and any additional standards specified in this subpart." *Goldberg*, in turn, requires that a recipient have timely and adequate notice

and the effective opportunity to defend by confronting adverse witnesses and presenting his own arguments and evidence orally. 397 U.S. at 267-68. This Court determined KMC had been denied due process because Idaho regulations provide no opportunity for cross-examination of the reviewing physician, or even knowledge of the reviewing physician's identity. *KMC,* CV 2006 9412, CV 2007 117 and CV 2007 2103*,* p. 12. As the Idaho regulations conflicted with federal regulations, federal regulations controlled and *Goldberg* required the comments made by an unnamed witness be stricken. *Id.*

In *Featherston,* the Seventh Circuit Court of Appeals held members of initial dental and medical review panels, used by the Indiana Department of Public Welfare to review denials of Medicaid benefits, were not adverse witnesses and claimants were therefore not entitled to the rights of confrontation and cross-examination. 626 F.2d 591, 593. The Seventh Circuit Court of Appeals reasoned the initial review panels "act as impartial assessors of plaintiffs' medical and social histories and as adjudicators of their entitlements to benefits", rather than functioning as adversaries to plaintiffs' claims. 626 F.2d 581, 594. In *Featherston,* the Seventh Circuit Court of Appeals did not consider the weight to be given non-examining review team reports, but noted that cases in which the Department of Public Welfare uses a review team report as substantive evidence of non-entitlement to benefits, the issue could be raised on direct appeal for substantial evidence review. *Id.,* at n. 3. The facts in the instant matter differ from the facts in *Featherston.* The hearing officer in *Featherston* relied on an alternate review panel. The Seventh Circuit Court of Appeals noted that while an initial review team making eligibility determinations is not an adverse witness, the alternate review panel used by the hearing officer to review the summary of the evidence and the officer's tentative findings of fact acted as expert witnesses or advisors to the Department of Public Welfare. *Id.,* at 595.

A Quality Improvement Organization, Qualis in the instant matter, may only disclose information on a particular practitioner or reviewer at the written request of, or with the written consent of, that practitioner or reviewer. 42 C.F.R § 480.133 (a)(2)(iii). The statue governing disclosure seeks to ensure peer review information is kept confidential through regulations aimed at protecting the rights and interests of patients, practitioners, and providers, and the federal regulations at issue effectuate this purpose by allowing disclosure of the identity of a peer reviewer only after obtaining written consent of the peer reviewer. *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services,* 444 F.3d 991, 996 (8th Cir. 2006). However, as determined by this Court in October 2007, testimony from an unnamed witness contravenes the *Goldberg* requirements and must likely be stricken from the record. *See KMC,* CV 2006 9412, CV 2007 117 and CV 2007 2103, p. 12. Thus, only the testimony of IDHW's witness Dr. Lehman would remain properly on the record. Hearing Officer Servick ruled the evidence of the "unnamed" physician was admissible, but concluded that it "was not persuasive to this hearing officer and therefore not a basis for her findings." A.R. 6, pp. 24-26. Pursuant to this Court's ruling in *Kootenai Medical Center v. Idaho Dep't. of Health and Welfare,* CV 2006 9412, CV 2007 117, CV 2007 2103 (Kootenai County Dist. Ct. Oct. 30, 2007), admitting that evidence was error. That error would result in at least a remand back to the hearing officer to revisit her decision without the inclusion of such evidence. However, the remaining evidence results in a reversal.

2. It Was Not Error to Consider the Medical Records, and Testimony Was Properly Considered by the Hearing Officer.

NIBH also argues the hearing officer's reliance solely on a review of the medical records was error to the extent such reliance was pursuant to IDAPA 16.05.03.131, because conflicting evidence had been received from the psychiatrist testifying for NIBH

and the pediatrician who testified for IDHW. Petitioner's Brief on Appeal, p. 12. NIBH appears to argue it was error for the hearing officer to solely consider the medical records, and presumably not considering the treatment team's certification and/or provision of documentation regarding whether resources in the community met the patient's treatment needs, whether proper treatment required inpatient services under the direction of a physician, and whether the services could reasonably have been expected to improve the condition or prevent further regression. *Id*. IDHW replies that the hearing officer properly considered all testimony and resorted to the medical records "solely due to the conflict in testimony regarding medical necessity between Drs. Ullrich and Lehman." Response to Petitioner's Brief on Appeal, p. 14. In her Findings of Fact, Conclusions of Law, and Preliminary Order, the hearing officer identifies the issue to be: whether the patient met the medical necessity criteria of IDAPA 16.03.09.701 on and after March 16, 2007; because she had received conflicting testimony from NIBH's witness, Dr. Ullrich, and IDHW's witness, Dr. Lehman, the hearing officer resolved this conflict by "focusing her evaluation on the NIBH medical records which document the care and treatment given to Jennifer while at NIBH." A.R. 6, p. 28. The record demonstrates that the hearing officer did consider the testimony of both parties' expert witnesses and resorted to the patient's medical records to resolve a conflict between the two experts' testimony. As such, NIBH has not demonstrated for this Court that the hearing officer erred in focusing on the medical records in this case.

B. Medical Necessity and "Gravely Impaired".

NIBH and IDHW disagree as to whether the hearing officer's interpretation of the IDAPA regulations on medical necessity and length of stay was proper. Petitioner's Brief on Appeal, pp. 12- 19; Response to Petitioner's Brief on Appeal, pp. 14-18. NIBH

argues Dr. Lehman's testimony confirmed the patient met the "gravely impaired" regulatory criteria despite his refusal to use that term to describe why she was in the hospital. Petitioner's Brief on Appeal, p. 17. IDHW argues that the medical records are devoid of any evidence of suicidal ideation and that the only evidence of the patient having been gravely impaired is the very act of overdose which led to her admission in the first place. Response to Petitioner's Brief on Appeal, pp. 14-16. IDHW states:

> The record demonstrates that there were never acute symptoms during her stay that suggested JRM's functioning was so limited as to have rendered her gravely impaired. In fact, as the hearing officer pointed out, grave impairment is not even addressed in the medical record.

Id., p. 16, quoting A.R. 14, pp. 5-6.

IDAPA 16.03.09.701.01 sets forth the medical necessity criteria which must be met for admission to the psychiatric unit of a general hospital. The child must meet one of the following criteria: (1) currently being dangerous to him or herself; (2) actively being violent or aggressive and exhibiting homicidal ideation or other symptoms indicating the child is a danger to others; or (3) the child being gravely impaired. IDAPA 16.03.09.701.01.a. Only the first and last criteria are at issue in this case. The patient's suicide attempt and suicidal ideation gave rise to approval of the first five days of hospitalization as she had actually made an attempt to take her own life within 72 hours of admission. A.R. 1, p. 112, ll. 3-6; IDAPA 16.03.09.701.01.a.i. However, beyond the approved initial five days of hospitalization, NIBH argues the patient met the medical necessity criteria because she was gravely impaired. Petitioner's Brief on Appeal, p. 17.

IDAPA 16.03.09.701.a.iii. lists the criteria for determining whether a child is gravely impaired. The child must have such limited functioning that physical safety is in jeopardy due to an inability for basic self-care, judgment, and decision making; or there

is an acute onset of psychosis or severe thought disorganization or clinical deterioration rendering the child unmanageable or unable to cooperate in a non-hospital setting; or there is a need for treatment, evaluation or testing where the child's level of functioning or communication precludes assessment and/or treatment in a non-hospital setting. IDAPA 16.03.09.701.a.iii. NIBH points the Court to the testimony of Dr. Lehman conceding that the patient's overdose to get her boyfriend's attention reflects a serious flaw in judgment, which, in turn, affects her well-being and safety. A.R. 1, p. 115, ll. 18-23, p. 116, ll. 1-3. IDHW argues that the record contains no evidence that the patient was unable to care for herself or had continuing limitations in judgment and decision-making such that her safety and well-being were in jeopardy. Response to Petitioner's Brief on Appeal, p. 16. IDHW points out that her previous diagnoses of borderline personality disorder and bipolar disorder, as well as her admitting diagnoses of dysthymia and anxiety disorder were chronic and unlikely to be resolved in an inpatient setting. *Id.* However, IDHW does not address its witness's testimony regarding her limited functioning such that her physical safety was in jeopardy due to an inability for basic self-care, judgment, and decision making. Despite the record not specifically addressing grave impairment, witness testimony presented to the hearing officer did specifically address grave impairment. It appears from the record that Dr. Lehman equated psychosis with grave impairment. Dr. Lehman stated:

> Well, maybe the words grave impairment because they're pretty standard words, but both the standard clinical criteria around the country and the IDAPA code specifically don't really get into great detail about what that actually means. Most people interpret that to be what most people would think of in a psychotic patient; has lost touch with reality, not able to make simple decisions, not able to do the most basic of daily activities necessary to get through the day. So that's what most people would consider gravely impaired. I don't think anybody would really qualify her as gravely impaired. Yeah, that's what I'd say, psychotic, out of touch with reality, and she doesn't have that.

A.R. 1, p. 130, ll. 20-23, p. 131, ll. 1-4. Dr. Lehman apparently confused or conflated the gravely impaired criteria discussing limited functioning and acute onset of psychosis. The hearing officer stated in her Order that the only functional limitations in the patient's record documented after March 16, 2007, were her poor decision-making skills. While such documentation would not suffice to find her actively psychotic, it does speak directly to her limited functioning due to judgment and decision-making. *See* IDAPA 16.03.09.701.01.a.iii.(1). Despite conflicting evidence in the record, an agency's factual determinations remain binding on a reviewing court where the determinations are supported by substantial competent evidence in the record. *Price v. Payette County Bd. Of Com'rs,* 131 Idaho 426, 958 P.2d 583 (1998). Such substantial competent evidence is lacking from the record before this Court. While Dr. Lehman refused to use the term "gravely impaired" to describe why J.R.M. remained in NIBH, Dr. Lehman's own testimony confirms she met the "gravely impaired" regulatory criteria.

Again, "gravely impaired" is defined under IDAPA 16.03.09.701.a.iii, as:

> iii. Child is gravely impaired as indicated by at least one (1) of the following criteria:
>
> (1) The child has such limited functioning that his physical safety and well being are in jeopardy due to his inability for basic self-care, *judgment and decision making* (details of the functional limitations must be documented); or
>
> (2) The acute onset of psychosis or severe thought disorganization or clinical deterioration has rendered the child unmanageable and unable to cooperate in non-hospital treatment (details of the child's behaviors must be documented); or
>
> (3) there is a need for treatment, evaluation or complex diagnostic testing where the child's level of functioning or communication precludes assessment and/or treatment in a non-hospital based setting, and may require close supervision of medication or behavior or both.

(italics added) Dr. Lehman testified:

> [Dr. Lehman] She is very, very likely to do this again [the intentional overdose], and it can also, it can be very impulsive, and they could say

> three seconds after they did it that it was not meant to kill themselves. *But there is a serious flaw in judgment there*. And if that happens to be happening in the framework of an acute overlay of some other problem; anxiety, depression, whatever, then that needs to be evaluated. So it's basically just an indicator. She OD'd. She said right off the bat that she was not intending to die. *But she had a serious flaw in judgment* and I don't know, are you getting that I was too lenient and should have approved those days.
> [Michael Hague] No. I guess what I'm getting at is that it sounds to me, you used the term "flaw in judgment" twice there, and it sounds to me like this, what her objective behavior was, combined with her subjective statements which were consistent all the way through really reflects that she was gravely disabled under iii(1).
> [Dr. Lehman] I would bet that if you lined up a hundred psychiatrists and asked if this patient was gravely disabled, I don't think you can get more than maybe one to agree to that. I don't think that fills pretty much anyone's criteria of gravely disabled.

Tr. p. 112, L. 12 – p. 113, L. 3. (italics added). While Dr. Lehman stated that only one out of one hundred psychiatrists would find J.R.M. "gravely disabled", in doing so, Dr. Lehman is apparently ignorant of or purposely ignoring the IDAPA definition, because he testified twice that J.R.M. suffered from a "serious flaw in judgment", and that IDAPA 16.03.09.701.a.iii(1) requires the person have "limited functioning that his physical safety and well being are in jeopardy due to his inability for basic self-care, *judgment and decision making."* (italics added). Later, Dr. Lehman testified "She had terrible judgment. I don't think anyone could have an argument with that.' Tr. p. 113, Ll. 15-16.

> [Michael Hague] Would you agree that that, that her stated reason for taking the OD that is to get her boyfriend's attention reflects a serious flaw in judgment?
> [Dr. Lehman] Yeah, sure does.
> [Michael Hague] A serious flaw in judgment that affects her well being?
> [Dr. Lehman] Yeah.
> [Michael Hague] And physical safety?
> [Dr. Lehman] Sure. Yes, but
> [Michael Hague] If you take her at her word then there is documentation in the file to demonstrate that she needed hospitalization under that criteria.
> [Dr. Lehman] You've just made a giant leap there.

Tr. p. 115, L. 18 – p. 115, L. 4. There is no "giant leap" to be made, Dr. Lehman's

testimony meets the criteria of IDAPA 16.03.09.701.a.iii(1). Dr. Lehman continued:

> [Michael Hague] So if you take her at her word, she wasn't trying to hurt herself, she just has extremely bad judgment.
> [Dr. Lehman] True.
> [Michael Hague] Ok. And there's documentation of that in the file.
> [Dr. Lehman] Yes.
> [Michael Hague] And that didn't, there was no indication that that changed or got better at all through the hospitalization.
> [Dr. Lehman] No. I wouldn't expect.

Tr. p. 117, L. 18 – p. 118, L. 3. Although Dr. Lehman refused to apply the term "gravely impaired" to J.R.M., his testimony meets the regulatory criteria under IDAPA 16.03.09.701.a.iii(1) for "gravely impaired".

At oral argument, counsel for IDHW, in response to the Court's questioning, stated that IDHW discontinued payment on March 15, 2007, which wouldn't take effect until midnight between March 15 and 16, 2007, yet medication was not first administered by NIBH until March 16, 2007. It is a mystery to this Court how J.R.M. could be gravely impaired for the first five days of a psychiatric hospitalization, yet spontaneously become not gravely impaired the day *before* any psychiatric medications were first tried during her hospitalization.

At oral argument, NIBH made the argument that if J.R.M. came into NIBH and were not admitted under the suicide subsection found in IDAPA 16.03.09.701.a.i(1)-(4), then she had to have been admitted under the gravely disabled subsection found in IDAPA 16.03.09.701.a.iii, and that since her condition did not change during her entire stay, benefits should not be denied. Certainly, that argument has logical appeal. But more importantly, this Court finds even the IDHW physician, Dr. Lehman, establishes J.R.M. continually met the gravely disabled criteria.

C. Length of Stay.

There is a conflict between IDAPA and the federal regulations on how length of

stay is determined. The difference boils down to IDAPA 16.03.09.702.02.c requiring "that additional days at inpatient level of care will improve the participant's condition", and 42 CRF § 441.152(3) which allows hospitalization upon certification by the team that "the services can reasonably be expected to improve the recipient's condition *or* prevent further regression so that the services will no longer be needed." (italics added). The italicized portion of the federal regulation shows that to the extent the IDAPA only allows continued hospitalization only when it is intended to improve the participant's condition, to the exclusion of those situations where it is certified continued hospitalization will prevent regression, the IDAPA is invalid. NIBH argues the hearing officer erred in relying on IDAPA 16.03.09.702.02, which requires a hospital to provide documentation sufficient to demonstrate the medical criteria (found in IDAPA 16.03.09 701.01, discussed *supra*) is still met, as this state regulation conflicts with 42 C.F.R § 441.152, which provides the team to certify the criteria are still met. Petitioner's Brief on Appeal, p. 18. IDHW argues there is no conflict because even if certification were a lesser hurdle to cross than providing sufficient documentation, nothing in the CFR prevents states from requiring documentation to support a hospital's certification. Response to Petitioner's Brief on Appeal, pp. 17-18. NIBH notes this Court's recognition of the fundamental shift between 42 C.F.R. § 441.152 (requiring a team specified in § 441.154 to certify that ambulatory care resources in the community do not meet the patient's treatment needs, proper treatment requires inpatient services under the direction of a physician, and the services can be reasonably expected to improve the condition or prevent further regression so that services will no longer be needed) and IDAPA 16.03.09.702, formerly IDAPA 16.03.09.079, (requiring the child meet the same criteria, but requiring "documentation sufficient to demonstrate medical necessity

criteria are still met"). Petitioner's Brief on Appeal, p. 12. This Court recognized a conflict between the former IDAPA 16.03.09.079.05 (requiring "documentation sufficient to demonstrate" the criteria are met) and 42 C.F.R. § 441.152 and stated, "[t]he IDAPA procedure lays the groundwork for arbitrary decision making. In any event, the federal regulations control." *KMC,* CV 2006 9412, CV 2007 117 and CV 2007 2103, pp. 13-14. Presently, the current IDAPA 16.03.09.702.02, by referring to the medical necessity criteria which includes the intensity of service criteria at IDAPA 16.03.09.701.01.b, continues to require the Regional Mental Health Authority to provide documentation that less restrictive services in the community are not available or do not meet the child's treatment needs, that the services provided in the hospital can be reasonably expected to improve the child's condition or prevent further regression, and that treatment of the child's condition requires inpatient services. This differs from a certification that certain criteria are met because, as this Court has noted:

> This is a fundamental shift, as it takes away from the provider being able to certify certain criteria are in place, to the reviewing physician now being able to determine when, if ever, treatment has provided "documentation sufficient to demonstrate" similar criteria are in place.

Kootenai Medical Center v. Idaho Dep't. of Health and Welfare, CV 2006 9412, CV 2007 117, CV 2007 2103 (Kootenai County Dist. Ct. Oct. 30, 2007), at p. 13. To the extent that a conflict remains between the state and federal regulations, the federal regulations remain controlling.

Additionally, as noted by NIBH, the hearing officer in the instant matter determined the patient fell within an exclusion under which Medicaid reimbursement would be denied. Petitioner's brief on Appeal, p. 18; A.R. 6, pp. 30-31. In fact, the hearing officer found:

> [T]he length of Jennifer's stay at NIBH on and after March 16th was

> not due to the severity of her illness but because Jennifer lacked a place to live and proper family support.

A.R. 6, p. 31. NIBH argues the patient met the severity of illness criteria and the intensity of service criteria found in IDAPA 16.03.09.701.01 and that, therefore, the hearing officer erred in determining the exclusion applied due to the child's lack of a place to live and lack of family supports. Petitioner's Brief on Appeal, p. 19. While the hearing officer notes the undisputed evidence of the treatment team's concern about the patient's living situation, the hearing officer has not provided this Court with any support for her conclusion that the patient's stay at NIBH on and after March 16, 2007, was not due to the severity of her illness, but because she lacked a place to live and family supports. IDHW argues the patient did not meet the severity of illness criteria and no services would have improved her condition or prevented regression, nor did her condition require inpatient services with 24-hour nurse observation, on and after March 16, 2007. Response to Petitioner's Brief on Appeal, pp. 16-17.

This Court must determine whether the patient met the medical necessity criteria of IDAPA 16.03.09.701. The record is devoid of the substantial and competent evidence necessary to uphold the hearing officer's findings as to the patient being gravely impaired, *see supra,* and IDHW's witness's testimony was that he did not know whether there was alternative, less restrictive treatment for the patient in this area. A.R. 1, p. 121, Ll. 4-7. Dr. Lehman does state, "I don't see any note that they even looked [for alternative less restrictive treatment]." *Id.,* at L. 7.

D. Attorney Fees.

Where appellate courts review a trial court's decision regarding attorney fees in an administrative civil judicial proceeding against a state agency, a *de novo* standard of review is used. *Rincover v. State Dep't. of Fin., Sec. Bureau,* 132 Idaho 547, 976 P.2d

473 (1999). Here, both parties seek attorney fees pursuant to I.C. § 12-117 and I.R.C.P. 54. Petitioner's Brief on Appeal, p. 2; Response to Petitioner's Brief on Appeal, p. 24. I.C. § 12-117 states:

> Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

Attorney fees are proper where an agency acts without a reasonable basis in fact or law by simply dismissing an appeal with no basis under an ordinance for doing so. *County Residents Against Pollution v. Bonner County,* 138 Idaho 585, 67 P.3d 64 (2003). Conversely, fees are not proper where an agency's action involved a reasonable yet erroneous interpretation of an ambiguous statute. *Cox v. Department of Ins.,* 121 Idaho 143, 823 P.2d 177 (Ct.App. 1991).

Both parties urged the Court to interpret IDAPA and federal regulations in accord with their positions. As this Court previously found, on facts very similar to these, a conflict between federal and state regulations, it is unlikely that either party acted without a reasonable basis in law or fact. Accordingly, even though NIBH prevailed on appeal, attorney fees to NIBH are denied. Attorney fees to IDHW are denied because IDHW did not prevail on appeal.

V. CONCLUSION AND ORDER.

For the reasons stated above, NIBH's due process rights were violated by the consideration of an unnamed physician, and the IDHW's decision is not supported by substantial and competent evidence because Dr. Lehman ignored the IDAPA definition of "gravely impaired", because the IDAPA and federal regulations on "length of stay" are in conflict, and because IDHW's witness was not even aware as to any alternative, less

restrictive treatment for the patient in this area. Neither party is entitled to attorney fees.

IT IS HEREBY ORDERED the decision of the Director of IDHW is REVERSED.

IT IS FURTHER ORDERED petitioner NIBH's claim be paid in full by respondent IDHW.

IT IS FURTHER ORDERED both parties claims for attorney fees on this petition for review are DENIED.

Entered this 24th day of June, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Michael B. Hague	(208) 664-6338	Lawrence G. Wasden Whitaker F. Riggs Jeanne T. Goodenough	(208) 334-5548

_____
Jeanne Clausen, Deputy Clerk