STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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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: Teresa K.),
Petitioner,

vs.

IDAHO DEPARTMENT OF HEALTH AND WELFARE.
Respondent.

Case No. **CV 2006 9412**

MEMORANDUM DECISION AND ORDER ON APPEAL

KOOTENAI MEDICAL CENTER (re: Joshua M.),
Petitioner,

vs.

IDAHO DEPARTMENT OF HEALTH AND WELFARE.
Respondent.

Case No. **CV 2007 117**

KOOTENAI MEDICAL CENTER (re: Jennifer G.),
Petitioner,

vs.

IDAHO DEPARTMENT OF HEALTH AND WELFARE.
Respondent.

Case No. **CV 2007 2103**

Attorney for Petitioner- Michael Hague
Attorney for Respondent- Idaho Department of Health and Welfare

Nature of Case: Petition for judicial review for the combined three cases regarding Medicaid reimbursement. KMC appeals from the Idaho Department of Health & Welfare Director's Final Decision and Order affirming the Preliminary

Order below. Reversed.

I. INTRODUCTION AND BACKGROUND.

The Petitioner Kootenai Medical Center (KMC), specifically its Northern Idaho Behavioral Health (NIBH) unit, provided psychiatric hospital care to Teresa K., Joshua M., and Jennifer G. Appellant's Brief, p. 2. In all three cases, the Idaho Department of Health and Welfare (IDHW) denied Medicaid reimbursement to some portion of each person's stay at NIBH. KMC has appealed each of these three cases. The parties submitted briefs in all three cases. The cases were consolidated only for purposes of oral argument. On September 13, 2007, oral argument was held on all three cases

A. Teresa K., Kootenai County Case No. CV 2006 9412.

Teresa K., a 19-year-old female, was treated as an inpatient at NIBH from November 6, 2005, to December 14, 2005, despite being committed to the custody of the Idaho Department of Health and Welfare (IDHW) on November 19, 2005. Appellant's Brief, p. 3. KMC applied to Idaho Medicaid for reimbursement for Teresa's entire length of stay at NIBH. *Id.* Qualis is a subcontractor of IDHW. Qualis makes reimbursement determinations. Qualis issued a "Retrospective Partial Certification Notice" on January 26, 2006, approving reimbursement for the period of November 6, 2005, through November 9, 2005, but denying payment of all other dates of service. R. Exh. 12, p. 2. NIBH appealed the dates of service denied. R. Exh. 12, p. 1. While that appeal was pending, IDHW paid for the dates of service from November 19, 2005, to December 12, 2005, the period in which Teresa was in the legal custody of the Department, but was still being housed at NIBH. R. Exh. 6 [Exh. A].

On August 3, 2006, Hearing Officer Susan Servick heard the appeal. Exh. 1. On August 27, 2006, the Hearing Officer issued her Findings of Fact, Conclusions of Law,

and Preliminary Order, affirming IDHW's determination to deny payment for the hospital stay of Teresa K. Exh. 5, p. 21. The Hearing Officer held: "The Procedural Rules [IDAPA] require that this hearing officer 'consider only information that was available to the Department *at the time the decision was made.*'" Exh. 5, p. 19. (emphasis in original). Hearing Officer Servick specifically noted: "This is a difficult case. The hearing officer is sympathetic to the position of NIBH." Exh. 5, p. 20. KMC appealed the decision of the Hearing Officer to the Director of IDHW. Exh. 4. The IDHW Director Richard M. Armstrong affirmed the decision of the Hearing Officer. *Id.* On December 18, 2006, KMC filed its Petition for Judicial Review.

B. Joshua M., Kootenai County Case No. CV 2007 117.

Joshua M., a 16-year-old male, was admitted to NIBH on August 20, 2005, after he attempted suicide. R. Exh. 5, pp. 2-5. Dr. Miewald conducted a psychiatric evaluation on August 21, 2005. *Id.,* p. 5. Psychological testing was ordered by Dr. Miewald due to the patient's history of substance abuse. *Id.* Psychological testing revealed a moderate amount of anxiety with depression. *Id.* Medication was not started until August 25, 2005, because Dr. Miewald wanted to observe Joshua in his group sessions and give him an opportunity to detoxify from the street drugs. *Id.* By August 31, 2005, Dr. Miewald felt that Joshua was ready for discharge. *Id.,* p. 7.

KMC applied to Idaho Medicaid for reimbursement for services rendered from August 21, 2005, to August 31, 2005. *Id.,* p. 2. The services provided during the period from August 21, 2005, to August 24, 2005 were approved by IDHW, and KMC was reimbursed. *Id.* However, for the remaining period from August 25, 2005 to August 31, 2005, Hearing Officer Susan Servick affirmed the Department's denial of payment to KMC. *Id.,* pp. 25-26. The Hearing Officer held: "The Procedural Rules [IDAPA] require

that this hearing officer 'consider only information that was available to the Department *at the time the decision was made.*'" Exh. 5, p. 21. (emphasis in original). Hearing Officer Servick specifically noted: "This is a difficult case. The hearing officer is sympathetic to the position of NIBH, who only wanted the best care for its patient." Exh. 5, p. 24. KMC appealed the decision of the Hearing Officer to the Director of IDHW, Richard M. Armstrong, who, on December 8, 2006, affirmed the decision of the Hearing Officer. R. Exh. 2. On January 5, 2007, KMC filed its Petition for Judicial Review.

C. Jennifer G., Kootenai County Case No. CV 2007 2103.

Jennifer G., a 14-year-old female, was admitted to NIBH on December 23, 2005, because of suicidal thoughts and urges to cut on herself. R. Exh. 5. KMC applied to Idaho Medicaid for reimbursement for services rendered from December 28, 2005, to January 4, 2006. *Id.* Dr. Lehman testifying for IDHW stated that although Jennifer having recurrent thoughts to seriously harm herself was a factor that justified Jennifer's admission to NIBH, the records did not support an admission beyond five days. *Id.* Hearings Officer Susan Servick affirmed the Department's denial of payment to KMC. *Id.,* p. 28. The Hearing Officer held: "The Procedural Rules [IDAPA] require that this hearing officer 'consider only information that was available to the Department *at the time the decision was made.*'" Exh. 5, p. 23. (emphasis in original). Hearing Officer Servick specifically noted: "These are very difficult cases and this one is no exception. The hearing officer is sympathetic to the position of NIBH, who only wanted the best care for its 14 year old patient." *Id.,* p. 27. KMC appealed the decision of the Hearing Officer to the Director of IDHW. R. Exh. 4. The IDHW Director Richard M. Armstrong affirmed the decision of the Hearing Officer. *Id.* KMC appealed the decision of the Hearings Officer to the Director of IDHW, who affirmed the decision. R. Exh. 2. On

March 22, 2007, KMC filed its Petition for Judicial Review.

II. ISSUES ON APPEAL.

The first issue is the appeal procedure utilized by the Hearings Officer and the Director of IDHW. KMC argues the appeal process is in contravention of controlling federal constitutional, statutory and regulatory law, and denies KMC due process. KMC argues that the regulations and practices promulgated and followed by the IDHW and Qualis allow only for written submissions to Qualis, and do not allow any opportunity to address verbal questions or confront conclusions or alleged deficiencies in the written submissions the "decision-maker" determines relevant to the issues at hand. KMC also argues Qualis employs a procedure in which a physician uncertified, untrained, and unqualified in the field of psychiatry is the primary "decision maker." Also, according to KMC, Qualis utilizes a second physician, whose identity and qualification are unknown, to perform an unidentified review of the written submissions. Both the first and second physicians' conclusions become Qualis' recommendation to IDHW.

IDHW's rules for appeal of an adverse decision by Qualis/IDHW disallow the Hearings Officer from considering any evidence or materials not presented to the decision makers at Qualis/IDHW. KMC asserts that those rules followed by the Hearings Officer and the Director of IDHW denied KMC its federal constitutional, statutory and regulatory rights of due process.

Second, KMC argues that the denial of KMC's application was arbitrary, capricious and in violation of the relevant substantive criteria for approval of its claim.

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 County 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).

Additionally, under the Idaho Administrative Procedures Act, 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, conclusion 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.

Idaho Code §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.

IV. ANALYSIS.

Under 42 USCS § 1396(a)(3), any participating state's Medicaid plan must

provide an opportunity for a fair hearing before the State agency for any individual's claim that has been denied. KMC argues that the case rules promulgated by the IDHW, either by design or omission, deny aggrieved parties the required due process rights of a "fair hearing." KMC cites *Goldberg v. Kelley*, 397 US 254 (1970), to illustrate the due process standards of a "fair hearing." The United States Supreme Court in *Goldberg* stated:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross examine adverse witnesses. **These omissions are fatal to the constitutional adequacy of the procedures.**

397 U.S. 254, 268, 90 S.Ct. 1011, 1021. (emphasis added).

IDAPA 16.0503.131 limits the Hearings Officer's authority on appeal by requiring the Director to consider only the information available to the Department at the time the approval or disapproval decision was made. KMC asserts IDHW's rules, and the Hearings Officer's adherence to them, and the Director's approval of both, violate the "fair hearing" requirements of federal law.

Additionally, under 42 CFR § 431.232 and 42 CFR § 431.233, the aggrieved party is entitled to a *de novo* appeal of an adverse determination of an application for medical assistance. As 42 CFR § 431.232 provides:

> If the decision of a local evidentiary hearing is adverse to the applicant or recipient, the agency must—
>
> > (c) Inform the applicant or recipient of his right to request that his appeal be a de novo hearing;

Additionally, 42 CFR § 431.233 provides:

> (a) Unless the applicant or recipient specifically requests a de novo hearing, the State agency hearing may consist of a review by the agency hearing officer of the record of the local evidentiary hearing

> to determine whether the decision of the local hearing officer was supported by substantial evidence in the record.
>
> (b) A person who participates in the local decision being appealed may not participate in the State agency hearing decision.

IDHW argues KMC is not entitled to due process because the fair hearing requirements cited in *Goldberg* and 42 CFR §431.200, *et seq.,* "are addressed to Medicaid *recipients* rather than Medicaid providers." Kootenai County Case No. CV 2006 9412, Response to Appellant's Brief, p. 12; Kootenai County Case No. CV 2007 117, Response to Appellant's Brief, pp. 3-4; Kootenai County Case No. CV 2007 2103, Response to Appellant's Brief, p. 6. While it is accurate that *Goldberg* dealt with recipients, nothing in *Goldberg* precludes application of that decision to providers.

IDHW also relies on *Geriatrics Inc., v. Harris,* 640 F.2d 262 (10th Cir. 1981), *Erickson v. U.S.A. X Rail Department of Health and Human Services,* 67 F.3d 858 (9th Cir. 1995), and *Lujan v. G & G Fire Sprinklers Inc.,* 532 U.S. 189, 149 L.Ed. 2d 391, 121 S.Ct 1446 (2001). The Tenth Circuit Court of Appeals in *Geriatrics* did not address the standing of a certified provider to assert due process rights when pursuing a claim for services rendered. Similarly, the Ninth Circuit Court of Appeals in *Erickson* did not concern a certified provider's due process rights relative to a claim for services rendered, but rather concerned the due process rights of a provider relative to certification to participate in Medicare. That decision simply stated "physicians do not have a property interest in continued participation in Medicare." 67 F.3d 858, 862. This Court agrees with KMC that neither *Erickson* nor *Geriatrics* support the argument made by IDHW, specifically, that KMC is not entitled to due process on its claims for payment of services rendered. Furthermore, after analyzing *Lujan v. G&G Fire Sprinklers Inc.,* 532 U.S. 189, 149 L.Ed.2d 391, 121 S.Ct 1446 (2001), this Court agrees with KMC that

Lujan does not support IDHW's position since the *Lujan* court did not hold that due process is met when a party is denied the opportunity to present testimonial evidence to the "decision maker" in the case, or when a party is denied the opportunity to cross examine witnesses against it.

KMC cites *Singleton v. Wolfe,* 428 U.S. 106, 49 L.Ed.2 826, 96 S.Ct 2868 (1977), as dispositive as to due process in this case. *Singleton* is on point. *Singleton* dealt with two physicians who brought an action challenging the constitutionality of a Missouri statute excluding abortions that were not "medically indicated" from the purposes for which Medicaid benefits are available to needy persons. The *Singleton* court ruled that physicians had standing to assert the rights of the patients after utilizing a two-part test which examined: (1) the relationship between the litigant and the nonparty and the resulting adequacy of representation of the rights of the latter by the former, and (2) obstacles in the way of the nonparty freely, fully and adequately litigating her own rights. 428 U.S. 106, 113-17, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d at 834-836. This Court finds in the present case, KMC adequately represents each of these three minors. KMC is in the better position financially to pursue reimbursement, and appeal if denied. KMC has the resources to litigate such a claim. KMC has the medical records and is able to "navigate" the reimbursement system. Each of these three minors lack all these things. KMC has a financial incentive to fully litigate reimbursement, and stands to gain additional reimbursement if the provider is correct in its position. This Court finds each of these three minors would face insurmountable obstacles litigating their own rights. This Court agrees, *Singleton* is dispositive of this case. Just as the United States Supreme Court held in *Singleton*: "A woman cannot safely secure an abortion without a physician's aid, and an impecunious woman cannot easily secure an abortion without

the physician's being paid by the State" (428 U.S. 106, 107, 117, 96 S.Ct. 2868, 2871, 2875), so too these minors suffering from a mental illness cannot be helped "without a physician's aid". These minors by definition are "impecunious", and if their physician's are not paid, they will have no mental health care. "Aside from the woman herself, the physician is uniquely qualified, by virtue of his confidential, professional relationship with her, to litigate the constitutionality of the State's interference with, or discrimination against, the abortion decision." *Id.* This Court finds the same can be said of the relationship between these impecunious minors suffering from a mental illness, each of them unstable and in crisis, and their treating physicians.

Also, KMC cites *Pediatric Specialty Care v. Arkansas Department of Human Services,* 293 F.3d 472, 477-78 (8th Cir. 2002), which applies the *Singleton* analysis to funding cuts to early intervention services. The Eighth Circuit Court of Appeals in *Pediatric Specialty Care* held that even if the providers did not have individual standing, they still had standing to assert the rights of their patients. Additionally, the Third Circuit Court of Appeals, applying the *Singleton* analysis in *Pennsylvania Psychiatric v. Green Spring HLT.,* 280 F.3d 278 (3rd Cir. 2002), held that because the psychiatrist could assert the rights of their patients, and because the membership society of psychiatrists had standing to assert the rights of its members (psychiatrist), the society had standing vis-à-vis this chain of connections. 280 F.3d 278, 289-90. Further, the *Pennsylvania Psychiatric* court held that it has never been a necessity that a third party claim must involve a constitutional right to be successful. 280 F.3d 278, 291.

Given the cited precedent by KMC, this 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. These findings by this Court are consistent with the Third Circuit Court of Appeals in *Pennsylvania Psychiatric:* "Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights." 280 F.3d 278, 289. A mental health patient faces stigma associated with their mental illness, which may prevent them from wanting to pursue this claim. 280 F.3d 278, 290. A mental health patient has potential incapacity to pursue legal remedies. *Id.*

KMC was denied due process. IDAPA 16.05.03.131 does not allow an independent Hearings Officer to consider all evidence pertinent to the case. Federal law provides KMC should have been given an opportunity to cross-examine adverse witnesses. 42 CFR § 431.205(d); *Goldberg vs. Kelley,* 397 US 254 (1970). 42 CFR § 431.205(d) provides:

> (d) The hearing system must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and any additional standards specified in this subpart.

Additionally, the U.S. Supreme Court in *Goldberg* stated:

> The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. *Id.,* 397 U.S. at 267-68.

The Idaho regulations not only give no opportunity for the provider (or whoever challenges the reviewing physician's determination) to cross examine the reviewing physician, but those same regulations require the provider you cannot be known to whoever is challenging the reviewing physician's determination. Since there is a conflict on this issue between Idaho and federal regulations, the federal regulations are controlling. 79 Am.Jur.2d, Welfare laws, § 35; *Martin ex rel. Hoff v. City of Rochester,* 642 N.W. 2d 1 (Minn. 2002); *Smith v. Rasmussen,* 249 F.3d 755, 757 (8th Cir.2001). Since KMC was not afforded the opportunity of cross examination, *Goldberg* requires the comments allegedly made by said "unnamed" witness must be stricken from the record. Dr. Lehman's opinions are not supportable, as he testified in each of the three cases that he had no idea what other less restrictive facilities there are in this area. Accordingly, his testimony is stricken as well. That leaves the testimony of the three treating psychiatrists in each of the three cases. As a result of adherence to the Idaho regulations, even though they are pre-empted by the federal regulations, these opinions were disregarded at all junctures below.

In CV 2006 9412, the Hearing Officer's rejection of psychiatrist Dr. Miller's testimony on the basis that it was irrelevant clearly violates 42 CFR § 431.205(d), 42 CFR § 431.232 and 42 CFR § 431.233, given that Dr. Miller offered the only competent psychiatric testimony on the record. Dr. Miller's testimony, in conjunction with the other

evidence of record, establishes the entire length of stay for Teresa K. met the qualifications for approval. In CV 2007 2103, the Hearing Officer's rejection of Dr. Nelson's testimony on the basis that it was irrelevant clearly violates 42 CRF § 431.205(d), 42 CRF § 431.232 and 42 CRF § 431.233, given that Dr. Nelson offered the only competent psychiatric testimony on the record. Dr. Nelson's testimony, in conjunction with the other evidence of record, establishes the entire length of stay for Jennifer G. met the qualifications for approval. In CV 2007 118, the Hearing Officer's rejection of Dr. Miewald's testimony on the basis that it was irrelevant clearly violates 42 CRF § 431.205(d), 42 CRF § 431.232 and 42 CRF § 431.233, given that Dr. Miewald offered the only competent psychiatric testimony on the record. Dr. Miewald's testimony, in conjunction with the other evidence of record, establishes the entire length of stay for Joshua M. met the qualifications for approval.

The Court in *Goldberg* provided that due process requires that a recipient be given the opportunity to defend termination by "presenting his own arguments and evidence orally." 397 U.S. at 268. Hence, Dr. Miller's, Dr. Meiwald's and Dr. Nelson's testimony should have been admitted. Since the testimony of Dr. Miller, Dr. Miewald and Dr. Nelson establishes the entire length of stay in question in each respective case, each case met the qualifications for approval. Accordingly, KMC must be awarded compensation for the patient's bills in their entirety.

Additionally, this Court finds IDAPA 16.03.09.079.05 conflicts with 42 CFR 441.152. The federal regulation requires the treatment team "certify" certain of three criteria are applicable to a given case, but the IDAPA regulations requires the provider provide "documentation sufficient to demonstrate" certain criteria. This is a fundamental shift, as it takes it 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. The IDAPA procedure lays the groundwork for arbitrary decision making. In any event, the federal regulations control. 79 Am. Jur. 2d, Welfare laws, § 35; *Martin ex rel. Hoff v. City of Rochester,* 642 N.W. 2d 1 (Minn. 2002); *Smith v. Rasmussen,* 249 F.3d 755, 757 (8th Cir.2001).

The regulations promulgated by IDHW illustrate a defective, arbitrary and capricious system of administering disputed Medicaid claims. Contrary to federal statutory and regulatory law, regulations promulgated by IDHW prevent aggrieved beneficiaries or their providers from prevailing in a Department hearing. Because Idaho state Medicaid law is in contravention to the federal law, the state law has no force and effect. 79 Am. Jur. 2d, Welfare laws, § 35; *Martin ex rel. Hoff v. City of Rochester,* 642 N.W. 2d 1 (Minn. 2002). States are not required to participate in the Medicaid program, but if they do they must comply with the requirements of the Medicaid Act and its regulations. *Smith v. Rasmussen,* 249 F.3d 755, 757 (8th Cir.2001). Idaho's procedural and substantive regulations conflict with federal regulations. The federal regulations control.

V. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED, based on the reasons set forth above, in each of these three cases, the decision of the Director of IDHW is REVERSED;

IT IS FURTHER ORDERED, in each of the three cases, Petitioner's claim be paid in full by Respondent.

ENTERED this 30th day of October, 2007.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2007, 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