IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE HOSPITAL AND NURSING HOME ASSOCIATION,

Plaintiff,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 3AN-19-08244 CI

ORDER RE: PRELIMINARY INJUNCTION

This matter is before the Court on the Alaska State Hospital and Nursing Home Association's motion for preliminary injunction. ASHNHA seeks to enjoin the Department of Health and Social Services from enacting or enforcing two different regulations: (1) emergency regulations reducing Medicaid reimbursement rates, specifically ending increases for inflation and cutting certain rates by 5%, and (2) proposed regulations permanently enacting these same reductions. After considering the parties' briefing, extensive oral argument, and supplemental briefing, the Court notifies the parties of its inclination to grant ASHNHA's motion for preliminary injunction. The Court also rules on some of ASHNHA's legal arguments, as requested by the parties at oral argument.

The Court is inclined to find that ASHNHA has raised, at the very least, serious and substantial questions regarding DHSS' finding of emergency. Therefore, the Court is likely to enjoin enactment or enforcement of the emergency regulations, if not the permanent regulations. Given both parties' acknowledgement of the serious repercussions of this decision, for the State, for ASHNHA's members, and for Medicaid recipients, the Court provides the parties an opportunity to confer and file any additional briefing in

light of the Court's inclination and legal rulings. The Court is particularly interested in any further information or argument regarding whether the circumstances leading to DHSS' issuance of the emergency regulations constituted an actual emergency. The Court also requires further response by ASHNHA to DHSS's request for a $3.3 million bond, in light of the mandatory nature of the Rule requiring that a bond be posted.

I. Discussion

ASHNHA asserts it is entitled to a preliminary injunction under either the probable success on the merits standard or the balance of hardships standard.[1] The applicable standard "depends on the nature of the threatened injury."[2] If the plaintiff faces irreparable harm and the defendant can be adequately protected, the balance of hardships standard applies.[3] Under this standard, "the plaintiff must raise serious and substantial questions going to the merits of the case."[4] If, on the other hand, the plaintiff faces "less than irreparable" harm or if the defendant cannot be adequately protected, the plaintiff must make a "clear showing of probable success on the merits."[5] For the purposes of assessing the harm to a party, a court must assume that that party will ultimately prevail.[6] If a court grants a preliminary injunction, the court must require the applicant to post security.[7]

Here, the Court finds that ASHNHA faces irreparable harm such that the balance of hardships standard applies. If the Court denied ASHNHA's request for a preliminary injunction, but ASHNHA ultimately succeeded in striking down DHSS' emergency regulations, then some of ASHNHA's members could be, in theory, reimbursed retroactively. However, the Court is persuaded by ASHNHA's evidence and argument that other, more final or permanent harms would result, particularly the loss of specialist physicians, including pediatric specialists, who are likely to decide not to practice in

[1] ASHNHA's *Motion for Preliminary Injunction*, p. 1–2 (July 12, 2019).
[2] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).
[3] *Id.*
[4] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (quotation and citation omitted).
[5] *Metcalfe*, 110 P.3d at 978 (quotation and citation omitted).
[6] *Alsworth*, 323 P.3d at 54.
[7] AK R. Civ. P. 65(c).

Alaska if the emergency regulations remain in place while a final ruling is pending.[8] The loss of such specialists, and the similar harms described in the affidavits accompanying ASHNHA's briefing, are irreparable. Meanwhile, if the Court issued a preliminary injunction, but DHSS ultimately succeeded, DHSS would certainly incur the costs of changing rates again and may have difficulty recovering amounts it overpaid to Medicare providers in the intervening time.[9] The Court recognizes, as does ASHNHA, that these harms to DHSS are substantial. However, unlike the losses referenced above, the costs to DHSS can be accounted for, particularly through the requirement of a bond, as requested by DHSS. Without determining which party is better positioned to represent the interests of Medicaid recipients, the Court notes that recipients are likely to suffer harm both as a result of these rate reductions and as a result of the disruption caused by a preliminary injunction enjoining the reductions.

Given the respective harms to the parties themselves, the Court will grant a preliminary injunction if ASHNHA can raise serious and substantial questions on the merits. As discussed below, ASHNHA likely has raised such questions regarding DHSS' finding of emergency. Moreover, even if the harm to ASHNHA is repairable or if a bond will not adequately protect DHSS, the Court is inclined to find that ASHNHA has satisfied the probable success on the merits standard as well. ASHNHA will probably succeed in arguing that no emergency existed to justify the emergency regulations.

ASHNHA's contention that no emergency existed is the first of five legal theories under which ASHNHA believes the emergency regulations are unlawful and must be enjoined. After addressing DHSS' finding of emergency as a basis for a potential preliminary injunction, the Court will address ASHNHA's four other theories. As outlined in its complaint ASHNHA contends that DHSS' emergency regulations are unlawful under (1) federal Medicaid law, specifically 42 U.S.C. § 1392a(a)(30)(A) (hereinafter "Section 30(A)"); (2) AS 47.07.070, which requires that Medicaid rates be based on the "reasonable costs related to patient care"; (3) holdings under which

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[8] *Motion for Preliminary Injunction*, p. 7.

[9] DHSS' *Opposition to Motion for Preliminary in Junction*, p. 25 (July 29, 2019) [hereinafter *Opp.*].

emergency regulations may not be arbitrary or unreasonable; and (4) procedural due process.

A. DHSS' Finding of Emergency

Emergency regulations must respond to an actual emergency. Under Alaska law, agencies may issue emergency regulations, without the usual requirements of the state Administrative Procedure Act (APA), upon a finding of emergency.[10] Any person may challenge an emergency regulation "upon the ground that the facts recited in the statement do not constitute an emergency . . . ."[11] Furthermore, "[i]t is the state policy that emergencies are held to a minimum and are rarely found to exist."[12]

Despite the explicit judicial review provision and stated policy, the Court was unable to locate a single instance in which a court in Alaska overturned an emergency regulation on the grounds that no emergency existed.[13] As such, the Court is without the benefit of direct precedent on what circumstances do and do not constitute an emergency. There is some indication, in dicta, that "a finding of emergency follows a fact-intensive inquiry into a set of events unlikely to be repeated."[14] It also appears as though some amount of consideration by an agency in advance of an emergency regulation, including holding a public meeting, does not preclude the agency from issuing the emergency regulation.[15]

Notwithstanding the absence of direct precedent, the Court believes that an emergency must be a sudden, unusual, and unpredictable event.[16] Events which take place periodically, or which are reasonably foreseeable, do not ordinarily constitute emergencies; if they did, then emergencies would not be rare, as required by law. An

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[10] AS 44.62.250(a). Although not at issue here, emergency regulations must also be "necessary for the immediate preservation of the public peace, health, safety, or general welfare." *Id.*

[11] AS 44.62.300(a).

[12] AS 44.62.270.

[13] *But see Order Granting Petitioners' Motion for Stay, Washington Chapter of the American College of Emergency Physicians et al. v. State of Washington, Health Care Authority,* No. 11-2-02109-0, 3 (Wash. Super. Nov. 18, 2011) (staying emergency regulations related to Medicaid services because "no emergency existed," presumably under Wash. Rev. Code § 34.05.350).

[14] *State of Alaska, Alaska Bd. of Fisheries v. Grunert,* 139 P.3d 1226, 1233 (Alaska 2006).

[15] *See Krohn v. State, Dep't of Fish & Game,* 938 P.2d 1019, 1020 (Alaska 1997).

[16] *See* EMERGENCY, Black's Law Dictionary (11th ed. 2019).

overbroad definition of emergency would allow agencies to frequently circumvent the requirements of the APA. The Court is concerned that DHSS has exceeded its emergency regulation authority, in this instance and perhaps in prior instances, by finding that the long-predicted outcome of a yearly budgeting process constituted an emergency.

On June 28, 2019, DHSS issued a *Finding of Emergency* solely on the grounds that the state budget for fiscal year 2020 "significantly underfunded" the Medicaid program.[17] Also on June 28th, Governor Dunleavy vetoed portions of the state budget, further reducing the funds available for Medicaid.[18] DHSS, however, explains that its finding of emergency was in response to the state budget alone, and not the Governor's vetoes.[19] In fact, DHSS reports that it had no advance knowledge of the Governor's vetoes.[20] Therefore, the question is, did the state budget, putting aside the Governor's vetoes, constitute an emergency?

The timeline produced by DHSS appears to show that it did not. DHSS knew about and began planning for the reductions to the state budget at least six months in advance of the emergency regulations. DHSS reports that it "expected" reductions to Medicaid in the state budget,[21] and actually "knew they were coming."[22] Like the public, DHSS learned late last year that the Governor intended to reduce Medicaid funding significantly: "Upon taking office [in December 2018], the governor proposed reductions to the Alaska Medicaid program in the amount of $225 million."[23] DHSS then worked between "January 5 and March 27, [2019]" to formulate its response.[24] In March, the Office of Management and Budget proposed a DHSS budget that reflected the substance of the eventual emergency regulations: an end to increases for inflation and a 5% rate cut.[25] On May 1st, DHSS made the call to issue emergency regulations,[26] which it did on

[17] DHSS' *Finding of Emergency* (July 1, 2019).
[18] ASHNHA's *Motion for Summary Judgment*, p. 2 (July 12, 2019).
[19] *Opp.*, p. 6, 20.
[20] Affidavit of Donna Steward, p. 9.
[21] *Opp.*, p. 6.
[22] Second Affidavit of Donna Steward, p. 2.
[23] Affidavit of Donna Steward, p. 3.
[24] *Id.*
[25] *Opp.*, p. 5.

June 28th. As characterized by DHSS, "[t]he emergency regulations were the result of months-long, in-depth exploration of various cost containment options" in response to the anticipated budget cuts.[27]

Thus, the state budget and DHSS' response to it have none of the hallmarks of an actual emergency. The reductions to Medicaid in this year's budget were reasonably foreseeable and, in fact, actually predicted and planned for by DHSS. DHSS had at least six months' notice before the state finalized the budget, a process the state completes every year. While this year's budgeting process may have been unusual, the reductions to Medicaid were not surprising. DHSS cannot argue that it had to wait for the final budget before issuing the emergency regulations, because DHSS began preparing regulations months before the state finalized the budget.

DHSS' desire to skip the non-emergency regulation process and realize cost savings in the first quarter of the fiscal year does not justify emergency regulations;[28] only an actual emergency can justify emergency regulations. Notably, in its own *Finding of Emergency*, DHSS cited its authority to implement cost containment measures in response to the state budget.[29] If DHSS has ample authority to reduce rates without issuing emergency regulations, then the decision to issue emergency regulations may be one of convenience, rather than necessity. Indeed, DHSS used emergency regulations in the same manner in 2015 and 2016,[30] further indicating that while DHSS may find emergency regulations convenient, DHSS may find emergencies in too many instances.

In order to give meaning to the statutes authorizing DHSS to issue emergency regulations, there must be some limit on the situations that justify emergency regulations. The Court is inclined to find that ASHNHA has shown that long-anticipated reductions to Medicaid funding in the state budget do not constitute an emergency. This finding renders the emergency regulations unlawful and requires the Court to enjoin their

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[26] Second Affidavit of Donna Steward, ex. A, p. 5.
[27] *Opp.*, p. 19.
[28] *See* Affidavit of Donna Steward, p. 8–10; Second Affidavit of Donna Steward, p. 2.
[29] *Finding of Emergency* (*citing* AS 47.07.036).
[30] Affidavit of Donna Steward, p. 4.

enactment or enforcement until it issues a final ruling on the merits. The Court is also likely to require that ASHNHA post a bond, as mandated by Rule 65. ASHNHA has indicated in oral argument that it is not prepared to post a bond, but has not at this time offered substantive argument against the amount of the bond suggested as appropriate by DHSS. ASHNHA has suggested that it may prefer that the Court avoid making this ruling on a preliminary basis, but rather reserve ruling until addressing the issue on summary judgment. Any further briefing of the parties should clarify their respective positions on this procedural suggestion, in light of the discussion in this order, and following an opportunity for the parties to confer.

B. Section 30(A)

Turning to ASHNHA's other arguments in support of a preliminary injunction, the Court finds that ASHNHA cannot enforce federal Medicaid law, even as a matter of state law. As such, the Court will not grant a preliminary injunction on these grounds.

ASHNHA argues that DHSS' emergency regulations violate Section 30(A) of federal Medicaid law. This section requires that states receiving federal Medicaid funding

> provide such methods and procedures . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.[31]

Precedent dictates that states submit reimbursement rate changes to the Center for Medicaid Services (CMS) as part of the State Plan Amendment process, during which CMS must ensure that a rate change actually complies with Section 30(A).[32] ASHNHA alleges that DHSS violated this section by: not submitting its rate changes to CMS in advance; not studying in advance whether the rate changes comply with Section 30(A); not providing certain information to CMS as required by federal regulations; and issuing rate changes that do not actually comply with Section 30(A).

[31] 42 U.S.C. § 1396a(a)(30)(A).
[32] *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1242, 1249 (9th Cir. 2013).

The problem with ASHNHA's argument is that providers, like ASHNHA, do not have a federal right of action to enforce Section 30(A). According to the U.S. Supreme Court in *Armstrong v. Exceptional Child Center, Inc.*, federal Medicaid law "precludes private enforcement of § 30(A) in the courts."[33] No matter how ASHNHA characterizes DHSS' alleged violation of Section 30(A), ASHNHA may not state a federal claim under that section. The U.S. Supreme Court reasoned that due to the "judicially unadministrable" nature of Section 30(A), that section must be enforced by CMS, if at all.[34]

In response, ASHNHA attempts to characterize its claim as one under state law, rather than federal law. This argument is also unavailing. ASHNHA cites a post-*Armstrong* Ninth Circuit case for the proposition that providers can sue under a particular California state law for that state's violation of Section 30(A).[35] This is not accurate though. In the case cited by ASHNHA, the Ninth Circuit was very specifically considering whether the involved providers' pre-*Armstrong* claim, which had since been settled, was based on federal or state law.[36] The Ninth Circuit strongly suggested that state law claims incorporating the requirements of Section 30(A) are no longer available post-*Armstrong*.[37] The Ninth Circuit also specifically noted disagreement in California's Court of Appeals, recognizing one such persuasive court holding that *Armstrong* prevents providers from reframing Section 30(A) violations as violations of state law.[38]

Alaska law may reference federal Medicaid law when it directs DHSS to set rates in accordance with federal law[39] and permits DHSS to "make those arrangements or regulatory changes [that are] not inconsistent with" federal law.[40] But these references—

[33] 135 S. Ct. 1378, 1385 (2015).
[34] *Id.*
[35] *Indep. Living Ctr. of S. California, Inc. v. Kent*, 909 F.3d 272, 281 (9th Cir. 2018).
[36] *Id.*
[37] *Id.* at 288 (Judge Christen, concurring).
[38] *Id. citing Santa Rosa Mem'l Hosp., Inc. v. Kent*, 25 Cal. App. 5th 811, 822, 236 Cal. Rptr. 3d 199, 207 (Ct. App. 2018), reh'g denied (Aug. 21, 2018) ("Plaintiffs contend, and the trial court ruled, that Armstrong precludes private enforcement of section 30(A) only in federal court. We disagree. All of the reasoning in Armstrong applies equally to proceedings in state as well as federal courts.").
[39] AS 47.07.070.
[40] AS 47.07.040.

to all of federal Medicaid law and not to Section 30(A) specifically—do not create an independent state law cause of action under Section 30(A). Accordingly, ASHNHA may not state a claim under Section 30(A), as a matter of federal or state law, at least as state law currently stands. The Court thus rules that Section 30(A) requirements cannot serve as a basis for issuance of a preliminary injunction.

C. ASHNHA's State Law Claims

ASHNHA asserts three other arguments for a preliminary injunction, which are based entirely on state law. While these arguments may ultimately have merit, there is currently insufficient evidence before the Court for the Court to determine whether ASHNHA has raised serious and substantial questions or shown probable success on the merits. For these reasons, the Court denies ASHNHA's request for a preliminary injunction on these three grounds.

First, ASHNHA alleges that DHSS violated AS 47.07.070. This statute requires that DHSS "shall, within the limit of appropriations made by the legislature for the department's programs . . . set rates for facilities that are based on [the] reasonable costs related to patient care."[41] ASHNHA argues that DHSS failed to consider the reasonable costs related to patient care before it issued the emergency regulations and that DHSS set rates that are not, in fact, based on the reasonable costs related to patient care. As an initial matter, the Court is not persuaded by DHSS' argument that AS 47.07.070 allows DHSS to set rates according to the state budget, without limitation. That interpretation of AS 47.07.070 would obviate the following requirement that rates relate to the costs of patient care.

Where all of AS 47.07.070 must be given effect, ASHNHA's claim becomes a question of what DHSS considered before it issued the emergency regulations, and/or a question of the actual relationship between the rates and the reasonable costs related to patient care. The Court lacks sufficient evidence to grant a preliminary injunction on either point. At oral argument, counsel for DHSS described six thousand pages of

[41] AS 47.07.070.

evidence regarding DHSS' deliberations in advance of the emergency regulations, which DHSS was in the process of providing to ASHNHA. None, or very little, of this evidence is yet before the Court. On the second point, ASHNHA only alleges in general terms that the emergency regulations "will result in reimbursement to many providers that is below the actual cost of providing the care."[42] This allegation, without additional evidence or data, does not allow the Court to compare DHSS' rates to the reasonable costs relating to patient care. Based on the insufficiency of the evidence, the Court is unable to assess the strength of ASHNHA's AS 47.07.070 claim.

This Court does recognize that in two prior cases, the Alaska Supreme Court has concluded that DHSS violated current or former versions of AS 47.07.070 when DHSS set reimbursement rates.[43] However, both of those cases addressed DHSS reimbursement rates for individual facilities and included detailed considerations of specific costs.[44] Also, in both cases, DHSS had reason to doubt the data it ultimately relied on in setting rates.[45] Under those cases, AS 47.07.070 has not been applied to general rate reductions, has not been applied in the absence of specific data on costs, and, actually, has only been applied when DHSS used data it should have known was inaccurate.

In its next claim under state law, ASHNHA contends that the emergency regulations are invalid because they are arbitrary and unreasonable.[46] While emergency regulations are exempt from certain requirements of the APA, emergency regulations are otherwise judged by the same standards as conventional regulations.[47] Emergency regulations, like non-emergency regulations, are presumed valid, placing the burden on the challenger.[48] ASHNHA argues that, if the Court examines DHSS' process, rather the

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[42] *Motion for Preliminary Injunction*, p. 6.

[43] *State, Dep't of Health & Soc. Servs. v. N. Star Hosp.*, 280 P.3d 575, 582 (Alaska 2012); *State, Dep't of Health & Soc. Servs. v. Valley Hosp. Ass'n, Inc.*, 116 P.3d 580, 585 (Alaska 2005) (holding that "a regulation that significantly under-compensated every facility's actual costs would be presumptively inconsistent with" a prior, similar version of AS 47.07.070).

[44] *N. Star Hosp.*, 280 P.3d at 578; *Valley Hosp. Ass'n, Inc.*, 116 P.3d at 582.

[45] *N. Star Hosp.*, 280 P.3d at 582; *Valley Hosp. Ass'n, Inc.*, 116 P.3d at 587.

[46] *Grunert*, 139 P.3d at 1232.

[47] *Id.* ("We review emergency regulations in the same way we review other agency regulations.").

[48] *Id.*

emergency regulations themselves,[49] the Court should find the emergency regulations arbitrary and unreasonable, because DHSS failed to take a "hard look at the salient problems and . . . genuinely engage[] in reasoned decision making."[50]

ASHNHA's argument regarding DHSS' process in the lead up to the emergency regulations also requires the Court to examine what DHSS considered. For the reasons discussed above, the Court lacks sufficient evidence to complete this examination. Therefore, the Court denies ASHNHA's request for a preliminary injunction on these grounds as well.

Finally, ASHNHA argues DHSS violated the due process clause of the Alaska constitution by setting rates by emergency regulation, without notice and comment.[51] As the Court understands it, ASHNHA argues that federal Medicaid law requires notice and comment, so a process that does not include notice and comment violates procedural due process. DHSS responds that ASHNHA could have, and did, provide input while DHSS prepared the emergency regulations.[52] However, informal involvement by ASHNHA cannot satisfy procedural due process.

More importantly, as discussed above, Alaska law does not incorporate federal Medicaid law such that ASHNHA has a state right of action to enforce it. To the extent ASHNHA is characterizing an alleged violation of Section 30(A), or the case law interpreting it, as a due process violation, the Court finds that this claim is unlikely to succeed.[53] To the extent ASHNHA is alleging DHSS' process, as a factual matter, violated procedural due process – above and beyond ASHNHA's argument that DHSS could not declare an emergency – then the Court again confronts the issue of the insufficiency of the evidence regarding what DHSS considered. Either way, the Court denies a preliminary injunction on procedural due process grounds, except to the extent

[49] *Ellingson v. Lloyd*, 342 P.3d 825, 830–31 (Alaska 2014).
[50] *Grunert*, 139 P.3d at 1232.
[51] *Motion for Summary Judgment*, p. 14–15.
[52] *Opp.*, p. 21.
[53] The Court also notes that AS 47.07.075, which applies to DHSS rate setting, references the APA, which includes AS 44.62.250, thereby permit rate setting by emergency regulation.

that this argument is inherently tied to the improper utilization of an emergency process where the Court is inclined to find there was no emergency.

D. DHSS' Proposed Permanent Regulations

Although the Court agrees that the issue of the sufficiency of notice provided by DHSS of its proposed permanent regulations may be ripe, ASHNHA is not likely to succeed in pursuing such a claim to the extent it relies upon enforcement of Section 30(A) and related regulations. To the extent that ASHNHA otherwise seeks to enjoin the proposed permanent regulations, the Court recognizes that these proposed permanent regulations are not final, and holds that additional challenges of the regulations at this time are not ripe.

II. Conclusion

For the reasons discussed above, the Court is inclined to grant a preliminary injunction as to DHSS' emergency regulations, because those regulations lack a necessary precondition, namely, an actual emergency. The Court is also likely to require a bond be posted in accord with Civil Rule 65(c). Given these likely conclusions, the Court welcomes additional, responsive evidence and/or briefing on the issues of DHSS' finding of emergency, the amount of any ordered bond, and any changes in the parties' procedural request of the Court in handling these issues. Both parties may submit such evidence or briefing by Friday, September 6, 2019.[54]

DATED at Anchorage, Alaska this 30th day of August, 2019.

JENNIFER S. HENDERSON
Superior Court Judge

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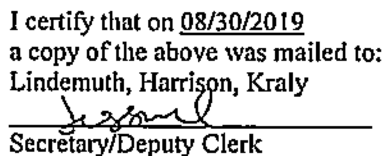

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[54] The Court recognizes that this schedule may depart from the parties' expectations, and will certainly consider requests to vary from that deadline.