



**State of New Jersey**

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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*Assistant Commissioner*

**STATE OF NEW JERSEY  
DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE  
AND HEALTH SERVICES**

M.H.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

MONMOUTH COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

**ADMINISTRATIVE ACTION**

**ORDER OF RETURN**

**OAL DKT. NO. HMA 11312-2018**

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the briefs filed below. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is June 28, 2020 in accordance with a Second Order of Extension.

The matter arises regarding the denial of Petitioner's second Medicaid application due to excess income. Petitioner, who is 99 years old, first submitted an application in December

2018. In November 2018 she used \$91,000 to purchase an annuity that began paying her \$6,078.79 for 14 months. R-4.

A second application was filed in May 2019. Petitioner sought to have Medicaid eligibility established as of August 2019. The annuity, which brought her total monthly income to \$7,791.87, would pay for her assisted living bill while she awaits the penalty imposed due to her transfer of \$127,978.29 to her family. This results in a penalty of 363 days. Monmouth County denied Petitioner's application for benefits as her income was sufficient to pay her medical expenses.

Petitioner is not seeking to have Medicaid pay for her care at this time. She has accepted and does not challenge that she transferred \$127,978.29 in assets. That results in a penalty of 363 days or nearly a year of benefits that Medicaid will not pay for. Monmouth County previously issued a letter that Petitioner was otherwise eligible as of August 1, 2019 but subject to a penalty until July 29, 2020. Monmouth County's subsequent rescission and issuance of a new denial letter is the subject of this fair hearing. The question is when the penalty starts.

The federal Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C.A. § 1396, et seq., provides for a joint federal-state program to provide medical assistance to individuals whose income and resources are insufficient to meet the cost of necessary medical services. 42 U.S.C.A. § 1396-1. Medicaid provides "medical assistance to the poor at the expense of the public." Estate of DeMartino v. Div. of Med. Assist. & Health Servs., 373 N.J. Super. 210, 217 (App. Div. 2004) (quoting Mistrick v. Div. of Med. Assist. & Health Servs., 154 N.J. 158, 165 (1998); citing Atkins v. Rivera, 477 U.S. 154, 156, 106 S. Ct. 2456, 2458, 91 L. Ed. 2d 131, 137 (1986)), certif. denied, 182 N.J. 425 (2005); see also 42 U.S.C.A. § 1396-1.

The Initial Decision upholds the denial finding that Petitioner had failed to demonstrate that she met the requirements for Medicaid. She presented no testimony nor any residuum of competent evidence to support the hearsay facts in the brief. While I agree

with that assessment, this finding of deficient proof is the same proof that Monmouth County used to issue the denial letter. The invoices from the assisted living facility cannot be both the basis of the denial and, at the same time, be found legally insufficient to support Petitioner's position. The paradoxical findings about the invoices cannot stand.

In exceptions, Petitioner argues that since she established a Qualified Income Trust (QIT), she should be found eligible so as to start the penalty. It should be noted that Petitioner's income, without the Medicaid annuity, is \$1,713.08 which would make her eligible without a QIT. The QIT was established to address situations where individuals in nursing homes had incomes that were "too low to enable them to pay their own nursing home costs, but too high to qualify for Medicaid benefits." Miller v. Ibarra, 746 F.Supp. 19 (1990).

As explained by the New Jersey Supreme Court in L.M. v. DMAHS, 140 N.J. 480,488-489 (1995):

We note that as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Pub.L. No. 103-66, Congress expressly provided for the creation of so-called "Miller Trusts," which permit "persons in income cap states whose fixed income places them over the income limit ... nevertheless [to] qualify for Medicaid nursing home benefits." Sanford J. Schlesinger & Barbara J. Scheiner, *OBRA '93 Makes Sweeping Changes in Medicaid Rules*, 21 *Est. Plan.* 74, 80 (1994). (Those trusts are so named because a precursor to the current codified version, involving the judicial creation of trusts for incompetent persons, was initially accepted in *Miller, supra*, 746 F. Supp. 19, as a method of excluding income for eligibility purposes, thereby avoiding the income cap.) Presently, in a state such as New Jersey, which provides for nursing-home coverage under 42 U.S.C.A. § 1396a(a)(10)(A)(ii)(V) but does not provide such coverage under the medically needy program, a trust containing "pension, Social Security, and other income to the individual" can be established under federal law to exclude that income from a Medicaid eligibility determination. 42 U.S.C.A. § 1396p(d)(4)(B)(i). That trust, however, must provide that "the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan." 42 U.S.C.A. § 1396p(d)(4)(B)(ii). Accordingly, those trusts provide a mechanism that prevents persons requiring long-term nursing-home care from becoming caught in the "Medicaid Gap," and also helps to preserve the financial integrity of the Medicaid program.

The court defined the Medicaid Gap as "a term used to describe a level of income that is 'just above the Medicaid cut-off yet too low to cover the cost of nursing home care.' Jill Quadagno et al., *Falling into the Medicaid Gap: The Hidden Long-Term Care Dilemma*, 31 *The Gerontologist* 521, 521 (1991)." Ibid at 480. Petitioner's income does not cause her to fall within the Medicaid Gap. It is the purchase of the Medicaid planning annuity that raises her income well beyond the Medicaid standard.

An individual's whose income exceeds the cost of care is antithetical to the purpose of Medicaid which is to provide benefits to qualified persons "whose income and resources are insufficient to meet the cost of necessary medical services." 42 U.S.C.A. § 1396-1. Medicaid "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." Atkins v. Rivera, 477 U.S. 154, 156 (1986).

However, the case here does not clearly show Petitioner's income exceeding the cost of care. Interestingly, when the monthly invoices of around \$10,000 are compared to her income of \$7,791.87, Petitioner has a monthly deficit of around \$2,200 during the transfer penalty. Additionally, the original eligibility date set of August 1, 2019 by Monmouth County is not supported by the assisted living facilities invoices as the final statement set the parameters through August 2019 and that final statement applies the August charges and shows a \$0.00 balance. Rather than inquire about the room and board charges or the nature of the billing, Monmouth County reversed its prior denial based on the billing invoice that the ALJ found to be unreliable. Additional information should have been requested before the rescission of the first letter to ensure the accuracy of the second outcome letter.

I FIND that the neither party can use the record as presented to support either party's argument. If it is insufficient for Petitioner, it is insufficient for Monmouth County. Therefore, the matter is hereby REVERSED with regard to the denial of Petitioner's application. The

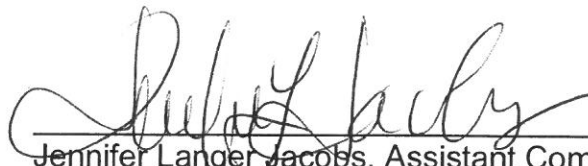
matter is hereby RETURNED to Monmouth County to make findings regarding Petitioner's eligibility and to expand the record to support the determination.

THEREFORE, it is on this 7<sup>th</sup> day of June 2020,

ORDERED:

That the Initial Decision is hereby REVERSED in part; and

That the matter is RETURNED to Monmouth County for further determination regarding Petitioner's eligibility and the issuance of a new outcome letter.

  
Jennifer Langer Jacobs, Assistant Commissioner  
Division of Medical Assistance  
and Health Services