



# State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Acting Commissioner

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Assistant Commissioner

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

**S.O.**

**PETITIONER,**

**v.**

**DIVISION OF MEDICAL ASSISTANCE :**

**AND HEALTH SERVICES AND :**

**BURLINGTON COUNTY BOARD OF :**

**SOCIAL SERVICES,**

**RESPONDENTS. :**

**ADMINISTRATIVE ACTION**

**ORDER OF RETURN**

**OAL DKT. NO. HMA 2967-2021**

**ON REMAND FROM HMA 7270-2020**

As Assistant Commissioner of 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 documents filed below. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Decision is October 28, 2021 in accordance with an Order of Extension.

The matter arises regarding the denial of Medicaid benefits due to Petitioner's

residence in a non-Medicaid assisted living facility. The denial letter states that Petitioner is residing in an assisted living facility that does not participate in the Medicaid program. R-A (HMA 7270-2020).<sup>1</sup> Petitioner is seeking eligibility as of June 1, 2020 at which time she was residing in the non-Medicaid facility. The record does not substantiate that Petitioner is otherwise eligible to receive Medicaid covered benefits either at a facility that does participate in the Medicaid program or through having Medicaid services provided by a provider enrolled with New Jersey Medicaid. See *M.W. v. SCBSS*, OAL DKT. No. HMA 2077-2013 (FAD August 13, 2013), the applicant was residing in a Veterans' Administration nursing facility which is not a Medicaid Title XIX facility.

Petitioner filed an application for benefits in June 2020. She listed she had made transfers beginning in 2018 that, at minimum, totaled \$218,693 reported income from Social Security and an annuity totaling \$5,406. R-C (HMA 7270-2020). The prior Order of Remand found:

The disclosures on the application raise questions about whether Petitioner is seeking to have Medicaid pay for benefits under Long Term Services and Supports (LTSS). The Initial Decision finds Petitioner that LTSS "can be provided in an assisted living facility setting and therefore contradict the basis of the denial." ID at 5. However, Petitioner's counsel states that Petitioner "is not asking New Jersey Medicaid to pay for or supplement any assisted living costs." Petitioner's Brief dated November 10, 2020. So what exactly is Petitioner asking New Jersey Medicaid to provide by filing an application for benefits?

The record in the first matter implied that Petitioner was seeking to have a penalty begin while utilizing an income stream from an annuity to pay privately. As such, the Order of Remand concluded:

Thus, I FIND that the record does not demonstrate that Petitioner is seeking or eligible to receive Medicaid covered services where she currently resides. On remand, the issue of the transfer penalty should be reviewed

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<sup>1</sup> The Initial Decision in this matter reused citations for the exhibits in the prior matter. References to the exhibits in HMA 7270-2020 will include that prior docket number.

and, if she is seeking to have the penalty begin, Petitioner should present further proofs so as to demonstrate that she would be entitled to receive Medicaid services while residing at a non-Medicaid facility. Such proofs may include her admission agreement and other authority to demonstrate that the facility permits Medicaid covered services to be provided to her but for the penalty period.

Indeed, on remand, Petitioner's counsel conceded that she was seeking to utilize Medicaid planning that is sometimes referred to as "half-a-loaf." This type of financial planning occurs where a Medicaid applicant gifts half of their assets while using the remaining half to pay for care during the transfer penalty. Prior to the enactment of the Deficit Reduction Act of 2005 ("DRA"), the transfer penalty began at the date the assets were transferred so that by the time an application was filed, the penalty period that restricted Medicaid from paying care was already running. The DRA specifically sought to put an end to this planning by delaying the start of transfer penalty until the applicant was otherwise eligible to receive Medicaid benefits. See N.M. v. Div. of Med. Assist. & Health Servs., 405 N.J. Super. 353, 362-63 (App. Div.), certif. denied, 199 N.J. 517 (2009) (explaining the Congressional intent behind the enactment of the DRA). Annuities, like the one purchased by Petitioner, were created wherein the applicant would outright transfer a portion of the assets and then purchase an annuity that would generate an income stream to pay the private pay rate while the penalty ran.<sup>2</sup>

I cannot say that Petitioner has demonstrated that Petitioner is at a facility where she would be otherwise eligible to receive LTSS services covered by Medicaid. While Petitioner did provide a copy of the admission agreement that references Medicaid, as the head of the Medicaid agency I must take administrative notice that this assisted living

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<sup>2</sup> Petitioner's reported monthly income is \$5,406 yet her residency agreement with the assisted living sets a monthly payment of \$8,235 which leaves her a deficit of nearly \$3,000 each month. Exhibit D.

facility does not participate in the Medicaid program. The assisted living facility is neither listed on the publically accessible provider directory for New Jersey Medicaid nor as accepting Medicaid payment on the Department of Health's website. See <https://www.njmmis.com/providerDirectory> (last visited on October 26, 2021) and <https://healthapps.state.nj.us/facilities/fsFacList.aspx> (last visited October 26, 2021).

The agreement also disclosed that Petitioner resides in the memory care community which requires an addendum to the lease agreement. R-D. That addendum appears to be missing pages as it abruptly ends and, unlike the other attachments, does not contain signatures of Petitioner or her Power of Attorney.

Thus, I ADOPT in part and REVERSE in part the Initial Decision's finding that Burlington County's denial should be upheld as Petitioner has not met eligibility due to financial planning and a private pay commitment to the facility. ID at 8. Rather Petitioner is correct in exceptions that Burlington County's decision was solely based on her residence in a non-Medicaid approved facility. But Petitioner has not provided competent evidence that she was entitled to receive LTSS services covered by Medicaid while living at the assisted living facility nor can she only wish to avail herself of ancillary benefits since her income exceeds community income standards. Only the LTSS program permits the use of a higher income level - 300 percent of the SSI benefit amount or, for individuals who exceed that amount, the use of a Qualified Income Trust (QIT). See 42 CFR § 435.236 and 42 CFR § 435.1005.

Petitioner argues in exceptions that she should be permitted to demonstrate that she meets financial eligibility through the use of a Grantor Trust as well as the aforementioned annuity. I cannot tell from the record if the trust was ever examined once Burlington County discovered the assisted living facility was not a Medicaid provider. In

order to create a complete record and to answer whether Petitioner can avail herself of Medicaid financial planning and begin a transfer penalty on “[t]he date on which the individual is eligible for medical assistance under the State plan and is receiving institutional level of care services (based on an approved application for such services) that, were it not for the imposition of the penalty period, would be covered by Medicaid;” the matter should be RETURNED to Burlington County for a review and full determination of the application mindful of the issue determined and raised in these proceedings. . See State Medicaid Director Letter, July 27, 2006 <https://downloads.cms.gov/cmsgov/archiveddownloads/SMDL/downloads/TOEnclosure.pdf>. See also 42 U.S.C. § 1396p(c)(1)(D)(ii).

THEREFORE, it is on this <sup>27<sup>th</sup></sup> day of OCTOBER 2021,

ORDERED:

That the Initial Decision is hereby ADOPTED in PART and REVERSED in Part as set forth above; and

That the matter is RETURNED to Burlington County as set forth above.



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