



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
PO Box 712
TRENTON, NJ 08625-0712

JENNIFER VELEZ
Commissioner

VALERIE HARR
Director

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

M.L.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 5902-2014
	:	
AND HEALTH SERVICES AND	:	
	:	
BURLINGTON COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

As Director 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 in evidence. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision is August 11, 2014, in accordance with N.J.S.A. 52:14B-10 which requires an Agency Head to adopt, reject, or modify the Initial Decision within 45

days of receipt. The Initial Decision in this matter was received on June 27, 2014.

This matter concerns the denial of Petitioner's Medicaid application due to excess resources. Petitioner and her husband resided at Ann's Choice, a continuing care retirement community (CCRC) in Warminster, Pennsylvania. When they moved to the facility in 2004, they paid an entrance fee of \$251,000 that guaranteed the couple a package of lifetime care. When Petitioner needed nursing home care in 2010, she entered a nursing home in New Jersey in July 2013. A Medicaid application was filed in February 2014. She died on April 9, 2014.

Burlington County determined that with the CCRC fee the couple had total resources of \$387,866.38. Petitioner and his wife were entitled to retain \$121,240 (\$117,240 for the community spouse + \$4,000 for Petitioner). The \$221,500 balance of the CCRC entrance fee alone exceeded this amount and Petitioner's application was denied.

The Initial Decision determined that the CCRC entrance fee was not a countable resource for the couple and that Petitioner's eligibility should be redetermined. For the reasons that follow, I hereby REVERSE the Initial Decision. I also note that M.G. v. DMAHS and Morris County, OAL Dkt No, HMA 13509-2013 wherein a similar CCRC fee was determined to be an available resource was adopted on March 26, 2014 and is applicable to this matter.

Federal law specifically includes CCRC entrance deposits as a countable resource when three conditions are met. 42 U.S.C.A. § 1396p(g)(2). That statute states:

An individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that—

(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

[42 U.S.C.A. § 1396p(g)(2).]

The Initial Decision does not address nor does Petitioner argue that the third requirement has not been met. A review of the contract shows that Petitioner does not have any ownership interest. Section 13.3. P-1 at 39. The issue is whether the first two requirements apply to Petitioner's CCRC fee. Petitioner acknowledges that a refund is possible but argues that since certain things must occur such as vacating the premises, the refund is not available. Petitioner also argues that Ann's Choice could not provide care for her so she had to seek care elsewhere and could not use the fee.

The Initial Decision concluded that since Petitioner's husband had to meet four conditions to get a refund of the fees, the requirement that the entrance fee is refundable was not met in this case. The Initial Decision also mentions that since Ann's Choice couldn't care for Petitioner she had to move elsewhere and the fees were not available to her. However, as explained below, the federal law and guidance show that the CCRC fees here are considered available to

Petitioner when determining eligibility. As such, she was over the resource limit and never achieved eligibility before her death.

The Centers for Medicare and Medicaid Services (CMS), as the federal agency with oversight and authority for the Medicaid program, explained that the federal statute requires the CCRC fee to be included in the resource standard when:

The provisions of the entrance contract are subject to the rules relating to the prevention of impoverishment of a community spouse under subsections 1924(c) and (d) of the Act. Therefore, any contractual provision requiring the expenditure of resident entrance deposits must take into account the required allocation of resources or income to the community spouse before determining the amount of resources that a resident must spend on his or her own care.

CMS Section 6015, Rules Pertaining to the Treatment of Continuing Care Retirement Community at 27, Centers for Medicaid and Medicare Services (July 27, 2006) <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/TOAEnclosure.pdf>.

Thus, in permitting the community spouse to retain the higher resource allowance, the entrance fee is considered a resource when it satisfies the three requirements under 42 U.S.C.A. §1396p(g)(2).

Additionally, in determining whether a CCRC entrance fee constitutes an available resource CMS stated:

The new subsection (G) defines when an entrance fee paid to a CCRC or life care community would be treated as a resource to an individual for purposes of determining Medicaid eligibility. The following three conditions must all be met in order for the entrance fee to be considered an available resource:

- The entrance fee can be used to pay for care under the terms of the entrance contract should other resources of the individual be insufficient; and
- The entrance fee (or remaining portion) is refundable when the individual dies or terminates

- the contract and leaves the CCRC or life care community; and
- The entrance fee does not confer an ownership interest in the community.

States should note that in order to meet the first condition listed above, it is not necessary for CCRCs or life care communities to provide a full, lump-sum refund of the entrance fee to the resident. If portions of the fee can be refunded or applied to pay for care as required, this condition would be met.

Also, in order to meet the second condition listed above, it is not necessary for the resident to actually receive a refund of the entrance fee or deposit. This condition is met as long as the resident could receive a refund were the contract to be terminated, or if the resident dies.

CMS Enclosure – Section 6015, *supra*, Rules Pertaining to the Treatment of Continuing Care Retirement Community at 27. (emphasis added).

Petitioner's CCRC contract also meets the refund requirement of 42 U.S.C.A. § 1396p(g)(2)(B) as it can be refunded. The Initial Decision did not determine the entrance fee could not be refunded but rather noted it was subject to certain conditions. There is no requirement that the refund is instantaneous and not subject to conditions agreed to by Petitioner and her husband. As CMS explained the CCRC contract is a resource for Medicaid purposes if it provides circumstances, such as the resident's death, where the fee could be refunded which is the case here.

Likewise the federal statute does not require that the entrance fee actually be used for care. Indeed the plain language of the statute only requires that "the contract provide[s] that the entrance fee **may** be used" to pay for care. 42 U.S.C.A. § 1396p(g)(2)(A). (emphasis added). The language of the contract

states that [a]fter the deletion of outside assets, the Entrance Deposit **is considered full available** to the Resident to pay and an all fees . . . including nursing fees.” Section 10.2 P-1 at 34. (emphasis added).

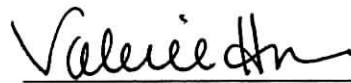
Petitioner failed to explain the circumstances of her move to other facilities other than in September 2011 her “care needs progressed beyond the care which could be provided at Ann’s Choice.” P-1 at 2. In exceptions Burlington County pointed out that while the nursing facility that would provide skilled nursing care at Ann’s Choice was being built in phases with completion dates through October 2011, Petitioner’s contract specifically provides that until completion “Ann’s Choice will enter into transfer agreement for its Residents with outside assisted living and nursing care centers.” Section 1.2. If those nursing home beds are fully occupied, the resident’s care will be provided through the transfer to another facility. Section 1.2.2. These sections afford Petitioner the right to receive skilled nursing home care through either Ann’s Choice or other provider under the terms of the CCRC contract. Petitioner’s unsupported explanation that Ann’s Choice could not provide care is insufficient to negate the statutory requirement that the provisions of the contract merely permit the use of the fees for care.

THEREFORE, it is on this ^{21st} day of JULY 2014

ORDERED:

That the Initial Decision is hereby REVERSED; and

That Burlington County's determination that Petitioner is not eligible for
benefits is upheld.

A handwritten signature in black ink, appearing to read "Valerie Harr", written over a horizontal line.

Valerie Harr, Director
Division of Medical Assistance
and Health Services