



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Commissioner

MEGHAN DAVEY
Director

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

Z.P.,

PETITIONER,

v.

MIDDLESEX COUNTY BOARD OF
SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 12271-17

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the Initial Decision, the documents in evidence and the contents of the OAL case file. Neither Party filed exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to render a Final Agency Decision is April 26, 2018 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 the agency's receipt. The Initial Decision was received on January 26, 2018.

Based upon my review of the record, I hereby ADOPT the recommended decision of

the Administrative Law Judge in its entirety and incorporate the same herein by reference. In 2006, the transfer penalty statute was amended by the Deficit Reduction Act of 2005 ("DRA"). See 42 U.S.C.A. § 1396p(c). Congress made the penalty for transfers harsher by extending the look back period from thirty-six to sixty months for asset transfers occurring after the date of enactment and making other changes to prevent those with assets from gaining eligibility.¹ In addition, Congress modified the statute so that the transfer penalty begins the later of the first day of the month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance and would be receiving institutional level of services but for the penalty period. 42 U.S.C.A. § 1396p(c)(1)(D)(ii). The Centers for Medicare and Medicaid Services (CMS), which is tasked with the federal administration of the Medicaid program, has stated that "[o]nce the penalty period is imposed, it will not be tolled (i.e. interrupted or temporarily suspended), it will continue to run even if the individual subsequently stops receiving institutional level of care." State Medicaid Letter, July 26, 2006. For these reasons, the 374 penalty period began to run on December 1, 2016, the day Petitioner met income, resource and clinical eligibility, and would run continuously through December 11, 2017 without sporadic tolling during that period.

Furthermore, the rules specifically require that during a penalty wherein nursing facility benefits are not covered, the recipient is entitled to ancillary services. See N.J.A.C. 10:71-4.10(m) ("For the purposes of this subchapter, the penalty period shall be the period of time during which payment for long-term care level services is denied. An institutionalized individual who is ineligible for payment of long-term care services as a

¹ See Opening Statement of Senator Chuck Grassley, Chairman, Senate Finance Committee, Budget Hearing with Secretary Michael Leavitt, February 9, 2005. "The DRA will ensure that ... elder law attorneys no longer exploit loopholes to get people with means onto Medicaid." <http://finance.senate.gov>. The DRA was enacted on February 8, 2006.

result of an asset transfer shall be precluded from eligibility, but shall be entitled to ancillary services if otherwise eligible.”) Accordingly, Petitioner could be eligible for ancillary services during the penalty period.² However, it is unclear why MCBSS continues to find Petitioner eligible for ancillary services even after the penalty period expires, specifically January 2018 and March 2018 through June 2018. If there is some other reason why Petitioner would not be eligible for Medicaid benefits, such as a subsequent transfer, after the penalty period has run, MCBSS should state that reason in a letter to Petitioner.

THEREFORE, it is on this 6th day of APRIL 2018,

ORDERED:

That the Initial is hereby ADOPTED and the matter is RETURNED to MCBSS for a determination of eligibility.



Meghan Davey, Director
Division of Medical Assistance
and Health Services

² Ancillary services are not available if the Petitioner is ineligible for Medicaid benefits. It appears that during the months of tolling, Petitioner was not eligible for ancillary services. However, the denial of ancillary services does not toll the penalty period.