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State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
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SARAH ADELMAN
Commissioner

GREGORY WOODS
Assistant Commissioner

L.C.,

PETITIONER,

v.

ATLANTIC COUNTY DEPARTMENT
OF FAMILY AND COMMUNITY
DEVELOPMENT AND DMAHS,
RESPONDENT.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 00045-2024

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is November 7, 2024, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated October 27, 2023, the Atlantic County Department of Family and Community Development (Atlantic County) granted Petitioner's Medicaid application with eligibility as of July 24, 2024; however, a penalty of eighty-four days was assessed resulting from a transfer of assets totaling \$32,485 for less than fair market value during the five year look-back period. ID at 3, 4. The matter was transferred to the Office of Administrative Law (OAL) on January 2, 2024. A request for a fair hearing was

filed on behalf of Petitioner by the law firm of Cowart Dizzia, LLP ("the firm").¹ ID at 4. Prior to the scheduled hearing in this matter, the Administrative Law Judge (ALJ) raised *sua sponte* an issue of whether A.D., Esq., of the firm had standing to file an appeal on Petitioner's behalf. ID at 2. Based on the ALJ's actions, Atlantic County filed a motion to dismiss. ID at 3.

The critical issue of standing overrides any discussion of the Medicaid imposition of the transfer penalty imposed on Petitioner. "A court's decision regarding standing is a question of law subject to de novo review." Petro v. Platkin, 472 N.J. Super. 536, 277 A.3d 480, 2022 N.J. Super. LEXIS 86, 2022 WL 2080282 *quoting Cherokee LCP Land, LLC v. City of Linden Plan.Bd.*, 234 N.J. 403, 414-15, 191 A.3d 597 (2018). "The concept of standing in a legal proceeding refers to a litigant's ability or entitlement to maintain an action before the court." N.J. Dep't of Env't Prot. V. Exxon Mobil Corp., 453 N.J. Super. 272, 291, 181 A3d 257 (App. Div. 2018) *quoting People for Open Gov't v. Roberts*, 397 N.J. Super 502, 508-09, 938 A.2d 158 (App. Div. 2008). "Whether a party has standing is a threshold justiciability determination." *quoting In re Six Month Extension of N.J.A.C. 5:91-1 et seq.*, 372 N.J. Super. 61, 85, 855 A.2d 582 (App. Div. 2004). "The standing requirement cannot be waived, nor may standing be conferred by consent." Ibid.

By way of background, on April 4, 2024, A.D., Esq. sent a letter to the OAL which indicated that the firm would appear on behalf of Petitioner. ID at 4. This letter indicated that the firm was counsel to J.T., an employee of Hammonton Care Center (Hammonton) where Petitioner resides and the designated DAR. Ibid. Attached to the April 4th letter

¹ Cowart Dizzia "is a full-service healthcare law firm dedicated to servicing the unique needs of long-term care providers in regulatory, compliance, operation and corporate matters." See <https://www.cowartdizzia.com>. See RPC 1:1-13(a). A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, employees, members, shareholders or other constituents.

was a copy of the DAR form signed by J.T., dated November 15, 2022 and three other documents entitled "Assignment of Medicaid Benefits, Designation of Authorized Representative and Authorization for Release of Health Information." Ibid. The documents were allegedly signed by Petitioner. Ibid. A total of four different DAR forms were submitted on behalf of Petitioner. The DAR forms dated November 15, 2022 and May 29, 2024 named J.T. as Petitioner's DAR and was signed by both J.T. and Petitioner. See Petitioner's Brief, Exhibit 1-2. The other two DAR forms dated September 12, 2023 and April 25, 2024, were prepared by the firm and signed by witness R.T. and Petitioner only. See Petitioner's Brief Exhibit 4-5. The September 2023 DAR form authorizes Hammonton and its attorneys as Petitioner's Authorized Representative and indicates that the facility and law firm were authorized to initiate Medicaid applications, participate in eligibility reviews, take action to establish Medicaid eligibility for Petitioner and participate in hearings or court proceedings. On the second page of the document Petitioner's waiver provides in part:

I waive any potential or actual conflicts of interest that may exist now or in the future as a result of this appointment or from the Authorized Representative's employment of legal counsel. I understand and agree that any attorney engaged by my Authorized Representative, including but not limited to Cowart Dizzia, LLP, pursuant to his [sic] authorization does not represent me personally nor does such engagement form an attorney client relationship with me. I further agree that any assistance provided by the Authorized Representative, the Facility, or their attorneys pursuant to this authorization does not preclude the Authorized Representative, the Facility or their attorneys from taking any and all actions necessary to recover unlawfully converted assets which may prevent me from qualifying for Medicaid benefits. Any information obtained by the Authorized Representative, the Facility, or their attorneys while performing activities pursuant to this authorization may be used by the Authorized Representative, the Facility, or their attorneys in any future action necessary to qualify me for Medicaid benefits or for any other reason.

See Petitioner's Brief, Exhibit 4.

The April 2024 DAR form submitted was a revised version of the September 2023 submission. The first notable change involved removal of language, "does not represent me personally nor does such engagement form an attorney client relationship with me." The second change added language that Petitioner authorized the "Authorized Representative's legal counsel, [the firm] to represent [Petitioner's] interests in the appeal of Medicaid eligibility" specific to the matter at hand. See Petitioner's Brief, Exhibits 4-5.

After oral argument on the motion to dismiss, the Initial Decision determined that the firm did not have standing to pursue an appeal on behalf of Petitioner. ID at 11. The Initial Decision determined that the firm represents the facility and employee, J.T., named as Petitioner's DAR. Ibid. The Initial Decision determined that the appeal was filed on behalf of the Petitioner, not the facility or J.T., and that the facility has not been named as a party. Ibid. The Initial Decision also determined that the firm has presented no evidence to show that consent exists, nor is there anything in writing to show that the facility has waived informed consent as required by RPC 1.7. Ibid. The Initial Decision makes no substantive determination related to the underlying issue of the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits, and exclusively focuses on the issue of standing as it appropriately overrides any discussion related to the denial of Petitioner's Medicaid application. I agree. Most troubling in this matter is the lack of clarity surrounding the attorney-client relationship between Petitioner and the firm. All of the evidence presented shows the firm has stated in unequivocal terms that it represents the facility and the facilities employee serving as Petitioner's DAR. As a general rule, resolution of a conflict of interest requires that each affected client give informed consent, confirmed in writing after full disclosure and consultation. RPC 1.7.

Rule RPC 1.7 provides in pertinent part:

a. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1) the representation of one client will be directly adverse to another client; or

2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved.

There is no evidence that informed consent occurred in this matter, nor is there any evidence that the facility waives any conflict of interest as required by RPC 1.7. In fact, although the two private DAR forms prepared by the firm include waiver and conflict of interest language, it fails to fully explain the advantages and risks involved with potential dual representation as required by RPC 1.7.

It is well established that individuals other than an applicant's personal attorney, relative by blood, marriage or beneficiary's legal guardian must complete the DAR form established by the Division. See Med Com No. 11-03. Despite being challenged, use of the DAR form was upheld in E.B. v. Division of Medical Assistance and Health Services, 431 N.J. Super., 183 (App. Div. 2013). In E.B., the court noted that use of a specific DAR form furthers DMAHS's interest in "protecting our State's most vulnerable citizens from potential fraud and misrepresentation." Ibid. at 209. By comparison, the firm's private DAR form includes language that is not present in the standard DMAHS form. More specifically, the law firm's DAR form includes language that allows the facility or its representative to recover unlawfully converted assets, take any future action necessary

to qualify for Medicaid benefits or for any other reasons. Use of this language in the private DAR form is inconsistent with the DMAHS standard DAR form. See Med Com 11-03. In addition, unlike the standard DAR forms submitted dated November 15, 2022 and May 29, 2024 that identify J.T. as Petitioner's representative, the private DAR forms prepared by the firm fail to name any specific person and only name the facility and law firm as Petitioner's representative. Perhaps most notable in difference from the DMAHS form is that the firms DAR forms includes the added language "waive any potential or actual conflicts of interest that may exist now or in the future as a result of the appointment or from the Authorized Representative's employment of legal counsel," that may not be in the Petitioner's best interest. See Respondent's Brief at 2.

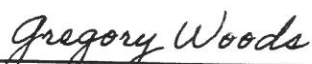
In fair hearings, representation "shall be pursuant to N.J.A.C. 1:10B-5.1," which provides, "An applicant/recipient may appear at a proceeding without representation or may be represented by an attorney or by a relative, friend or other spokesperson pursuant to the procedures set forth in N.J.A.C. 1:1-5.4. See: 42 C.F.R. 431.206(b)(3). A reading of the regulations makes it abundantly clear that anyone authorized to act in the place of the actual individual whose Medicaid eligibility is at issue does so only as an agent for and on behalf of that individual. J.H. v. Division of Medical Assistance and Health Services and Mercer County Board of Social Services, HMA 06733-09 & 06734-09, Interlocutory Order (December 15, 2009). The party at interest in the application and in the fair hearing is always the individual, not the facility where the individual resides. Ibid. Moreover, the regulations for Medicaid benefits create a hearing process for recipients and applicants separate from that of providers. E.J v. Morris County Department of Family Services, HMA 08661-2021 on remand 08958-2020, Final Agency Decision (June 13, 2022) quoting A.T. v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services, HMA 12107-04, Initial Decision (August 22, 2005). Based on

the record before me, it appears the firm has no standing to appeal this matter on behalf of Petitioner and may be inappropriately attempting to use the OAL as a forum to have its claims paid.

THEREFORE, it is on this **6th** day of NOVEMBER 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED as set forth above.



Gregory Woods, Assistant Commissioner
Division of Medical Assistance
and Health Services