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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4911-13T1

R.W., P.H., E.K., R.M.,
A.N., C.P. and R.T.,

Petitioners-Appellants,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES and MONMOUTH
COUNTY BOARD OF SOCIAL SERVICES,

Respondents-Respondents.

Argued December 14, 2015 – Decided February 22, 2016

Before Judges Simonelli, Carroll and
Sumners.

On appeal from the Division of Medical
Assistance and Health Services.

Robert F. Brogan argued the cause for
appellants (Brogan Law Group, attorneys; Mr.
Brogan and Melissa Abu-Adas, on the briefs).

Stephen Slocum, Deputy Attorney General,
argued the cause for respondents (John J.
Hoffman, Acting Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney
General, of counsel; Mr. Slocum, on the
brief).

PER CURIAM

Appellants R.W., P.H., E.K., R.M., A.N., C.P., and R.T., appeal from the May 9, 2014 final agency decision of respondent Division of Medical Assistance and Health Services (DMAHS), which reversed the initial decision of an administrative law judge (ALJ) and affirmed the decision of respondent Monmouth County Board of Social Services (Board) to terminate or deny appellants' eligibility for the Global Options Medicaid waiver program (GO program). For the following reasons, we affirm.

We derive the following facts from the record. Appellants are residents of Francis Asbury Manor (FAM), a non-profit assisted living facility licensed by the New Jersey Department of Health (NJDOH) pursuant to N.J.A.C. 8:36-1.1 to -23.18. FAM is operated by United Methodist Homes of New Jersey (UMH), a non-profit corporation. UMH is funded by the United Methodist Homes of New Jersey Foundation (Foundation), a non-profit corporation.

The Foundation advertised on its website that it had a Fellowship Fund, which "distributes \$2 million for charitable care . . . to benefit all our residents" and was "a financial safety net for residents [of UMH] who are no longer able to cover either part or the full cost of their care and/or

services."¹ A resident's participation in the Fellowship Fund was not automatic. A resident had to apply to participate, and the application was reviewed and considered in light of the resident's available assets. If qualified, a resident would receive a fellowship credit from the Fellowship Fund, which was individualized to the resident based on his or her income and applied to his or her monthly billing statement to reduce the total amount owed for the non-medical services provided. For example, R.W.'s January 2013 billing statement showed a prior balance of \$1,252.50, non-medical service charges totaling \$10,311.94, and fellowship credits totaling \$9,059.44, leaving a balance of \$1,252.50 owed by R.W.

Appellants' monthly billing statements in the record showed they received fellowship credits of approximately \$2500 to \$9000 per month, which reduced what they ultimately owed to FAM. No two residents received the same amount of fellowship credit.

The Board determined that the fellowship credit was a vendor payment includable as unearned income pursuant to N.J.A.C. 10:71-5.4(a)(6), which provides as follows:

Includable income

¹ The portion of the website that provided this information is listed in the ALJ's initial decision Exhibit R-5 and is included in appellants' appendix on appeal. Accordingly, appellants' argument that the website was outside the record lacks merit.

(a) Any income which is not specifically excluded under the provisions of N.J.A.C. 10:71-5.3 shall be includable in the determination of countable income. Such income shall include, but is not limited to, the following:

. . . .

(6) Vendor payments: Cash payments, except those for medical costs, which are made on behalf of the individual by an organization or other third party shall be included as unearned income.

Because each appellants' monthly fellowship credit placed them above the 2013 maximum qualifying income level of \$2130 per month for the GO program, the Board terminated or denied their eligibility for benefits. See N.J.A.C. 10:71-5.6(c)(5) (2013).

Appellants challenged the Board's decision, and the matter was transferred to the Office of Administrative Law for a hearing. Appellants argued before the ALJ that the fellowship credit was not income because FAM did not actually receive any payment and funds from the Fellowship Fund were not actually applied to their accounts. UMH explained that the fellowship credit was a credit that appeared on the bills of residents who did not have sufficient income or assets to pay their full cost of care and it represented the shortfall between the charge to the residents and what they could pay. Although the fellowship credit appeared as a credit on the billing statements, it was

not a payment; rather, it was a write-off of the shortfall to bring the bill down to the amount appellants could pay.

UMH also explained that although FAM received money from the Foundation to cover the shortfall, the amount received did not cover the entire amount and the balance came from FAM's operating budget. For example, FAM's 2014 operating budget showed fellowship credits in the amount of \$1,159,000, but the Foundation only paid \$350,000. In addition, the Foundation could elect not to pay any amount toward fellowship credits if it did not have the funds to do so, and, over the past seven years, the Foundation's payments have been decreasing.

The ALJ found that

[appellants] receive monthly statements that indicate that a [f]ellowship credit is being applied to their bills, and that this credit is not a personal benefit from the UMH, but rather an accounting device to show the shortfall in the cost of care between the residents' Social Security and pension income, and the total cost of the care provided to them by UMH. Essentially, the Foundation contributes to UMH to help offset its losses.

The ALJ rejected the Board's argument that the fellowship credit was a vendor payment includable as income under N.J.A.C. 10:71-5.4(a)(6). Instead, relying on N.J.A.C. 10:71-5.4(a)(13)(ii), the ALJ concluded that "the [f]ellowship credit and any other charitable contributions made by the Foundation to [UMH] and/or

FAM, whether directly credited on a resident's statement or included in the facility's ledger, are not includable as income."

N.J.A.C. 10:71-5.4(a)(13)(ii) excludes income from the support and maintenance furnished in-kind by a private nonprofit domiciliary care facility to "an individual in a nonprofit residential care facility[.]" DMAHS found this regulation did not apply because FAM is an assisted living facility, not a residential care facility. DMAHS concluded that the fellowship credit was a vendor payment and includable as unearned income under N.J.A.C. 10:71-5.4(a)(6). DMAHS noted that "[FAM] is a licensed assisted living facility and a Medicaid provider that is providing goods and services including room and board to individuals. [FAM's] non-profit status is for tax purposes and does not prevent payment by a third party (the [f]ellowship [c]redit) from being considered in-kind support." DMAHS also noted that pursuant to N.J.S.A. 30:4D-6(c), a "provider making a claim for payment pursuant to this act shall certify in writing on the claim submitted that no additional amount will be charged to the recipient . . . or others on the recipient's behalf for the services, goods, and supplies furnished pursuant to this act" and that Medicaid "payments shall constitute payment in full to the provider on behalf of the recipient."

DMAHS determined that "[FAM] created bills sent to Medicaid recipients/applicants and their families/representatives that demonstrated there were amounts due and owing and that the [fellowship credit] would cover a portion of their assisted living fees." DMAHS found that appellants' contention that the fellowship credit was merely an accounting device was belied by their invoices because, "[r]ather than applying the [F]ellowship [F]unds to general operations, these funds were distributed and applied to individual accounts at varying amounts and those amounts are relayed to [appellants] and their families."

DMAHS also noted that "the [Foundation's] website state[d] that residents will receive monies from the Fellowship Fund 'when a financial need is determined and continues throughout the resident's residency or lifetime[,]'" and therefore, "[i]t [was] clear that the payments from the [F]und [were] tied to specific circumstances of the residents and not for general operational shortfalls." DMAHS observed that the Foundation's website "describe[d] a litany of items that it will pay for and, since Medicaid rules prohibit charging the family or others for services that Medicaid pays for, the credit would likely be for room and board as Medicaid does not pay for those charges." Under all of these circumstances, DMAHS concluded that the Board properly determined that "these payments by a third party to the

provider of assisted living services, which includes room and board, was income" applicable to the residents' accounts. This appeal followed.

On appeal, appellants reiterate that the fellowship credit was not income because FAM did not actually receive payment and funds from the Fellowship Fund were not actually applied to their accounts. Appellants also contend that: (1) DMAHS erred in rejecting the ALJ's findings; (2) even if the fellowship credit represented a payment applied to appellants' accounts it was excludable as in-kind support and maintenance under N.J.A.C. 10:71-5.4(a)(13)(ii); and (3) even if the fellowship credit was counted as income, not all appellants were ineligible for benefits.²

Our review of administrative agency decisions is limited. R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 260-61 (App. Div. 2014). We must uphold an administrative

² We decline to address appellants' additional contentions that: (1) the fellowship credit was not a vendor payment under N.J.A.C. 10:71-5.4(a)(6); (2) even if the fellowship credit represented a payment applied to appellants' accounts it was excludable as in-kind support under N.J.A.C. 10:71-5.4(a)(13)(iii); and (3) the fellowship credit is not income under 42 U.S.C.A. § 1382a(a)(2)(A)(ii) and 42 U.S.C.A. § 1382a(b)(13). Appellants did not raise these contentions before the ALJ or DMAHS and they are not jurisdictional in nature nor do they substantially implicate the public interest. Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 643 (1997); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

agency's decision "'unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Id. at 261 (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 25 (2011)). In making this determination, we focus on three inquiries:

(1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.

[Ibid. (quoting H.K. v. Div. of Med. Assistance & Health Servs., 379 N.J. Super. 321, 327 (App. Div.), cert. denied, 185 N.J. 393 (2005)).]

"Deference to an agency decision is particularly appropriate where interpretation of the [a]gency's own regulation is in issue.'" Ibid. (quoting I.L. v. N.J. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 364 (App. Div. 2006)). However, we are not "'bound by the agency's interpretation of a statute or its determination of a strictly legal issue.'" Ibid. (quoting Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973)).

We have considered appellant's contentions that the fellowship credit was excludable as in-kind support and maintenance under N.J.A.C. 10:71-5.4(a)(13)(ii), and not all appellants were ineligible for benefits, in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we make the following brief comments.

FAM is not licensed by the Division of Community Affairs as a residential care facility, see N.J.A.C. 5:27A-1.1 to -17.4; it is licensed by the NJDOH as an assisted living facility pursuant to N.J.A.C. 8:36-1.1 to -23.18. Accordingly, DMAHS properly concluded that N.J.A.C. 10:71-5.4(a)(13)(ii), on which the ALJ incorrectly relied, did not apply.

Appellants provided no evidence of their monthly income or the actual distribution among FAM residents of the \$350,000 in fellowship credits FAM received in 2014. Accordingly, it cannot be determined whether or not the amounts set forth on appellants' billing statements were paid in full or allocated to the accounts of other residents. Appellants bore the burden to prove their eligibility for Medicaid benefits. Twp. Pharmacy v. Div. of Med. Assistance & Health Servs., 432 N.J. Super. 273, 281 n.4 (App. Div. 2013) (citation omitted). As the parties challenging an agency's action, they also bore the burden of

proving that DMAHS's decision was arbitrary, capricious or unreasonable." E.B. v. Div. of Med. Assistance & Health Servs., 431 N.J. Super. 183, 191 (App. Div. 2013). Appellants did not satisfy either burden of proof.

We now address appellants' remaining contentions that the fellowship credit was not income because FAM did not actually receive payment and funds from the Fellowship Fund were not actually applied to their accounts, and DMAHS erred in rejecting the ALJ's findings.

The GO program is a needs-based program within the Medicaid Only program. See N.J.A.C. 10:71-1.1 to -9.5. As a condition of eligibility, applicants must comply with the income standards set forth in N.J.A.C. 10:71-5.6. N.J.A.C. 10:71-5.1(a). "Income" is defined as "receipt, by the individual, of any property or service which he or she can apply, either directly or by sale or conversion, to meet his or her basic needs for food and shelter." N.J.A.C. 10:71-5.1(b) (emphasis added). "All income, whether in cash or in-kind, shall be considered in the determination of eligibility, unless such income is specifically exempt under the provisions of N.J.A.C. 10:71-5.3." Ibid. "In order to be considered in the determination of eligibility, income must be 'available.' Income shall be considered available to an individual when . . . the individual

actually receives the income[.]" N.J.A.C. 10:71-5.1(b)(1)(i) (emphasis added).

These regulations make clear that it is the individual seeking Medicaid eligibility who must actually receive the income being considered in the eligibility determination, not the assisted living facility. Appellants cite no authority supporting their position that in order to be considered income, the assisted living facility must actually receive payment. Thus, the question here is whether the fellowship credits should be included in the determination of appellants' income.

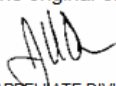
The fellowship credit does not fall within any exclusion under N.J.A.C. 10:71-5.3. "Any income which is not specifically excluded under the provisions of N.J.A.C. 10:71-5.3 shall be includable in the determination of income. Such income shall include, but is not limited to" vendor payments for non-medical costs "which are made on behalf of the individual by an organization or other third party." N.J.A.C. 10:71-5.4(a)(6). Income from vendor payments must be considered in the determination of eligibility whether received in cash or in-kind. N.J.A.C. 10:71-5.1(b).

Here, the fellowship credit was not an accounting device or "internal notation," as appellants posit. The Foundation advertised to the public that its Fellowship Fund provided

financial assistance to residents who could not pay part or all of the costs for their care and services. Appellants qualified for fellowship credits based on their individual financial circumstances. They actually received fellowship credits on their monthly billing statements, and the credits were applied to their individual accounts and reduced what they owed FAM for non-medical services. Accordingly, DMAHS correctly determined that the fellowship credits were vendor payments includable as unearned income in the determination of appellants' eligibility for the GO program. DMAHS's decision is not arbitrary, capricious or unreasonable, and is amply supported by the record. R.S., supra, 434 N.J. Super. at 261.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION