



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

OAL DKT. NO. HMA 14667-15  
AGENCY REF # 05-1002930-01

**E.W.,**

Petitioner,

v.

**CAPE MAY COUNTY BOARD  
OF SOCIAL SERVICES AND  
DIVISION OF MEDICAL ASSISTANCE  
AND HEALTH SERVICES,**

Respondents.

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**Pamela A Quattrone, Esq.,** for petitioner (Rice & Rice, PC, attorneys)

**Lauren Fogarty, Esq.,** Assistant County Counsel for the Cape May County  
Board of Social Services

**Division of Medical Assistance and Health Services,** respondent, appearing  
without a representative, pursuant to N.J.A.C. 1:1-5.6(a)

BEFORE **W. TODD MILLER, ALJ:**

The issue before this tribunal is whether petitioner received sufficient notice prior to the December 3, 2015 plenary hearing. The background is as follows. On February 13, 2012, petitioner purchased a residence located at x Gladwyn Drive, Ocean View, New Jersey. Title to the home was recorded solely in the name of petitioner. The seller

was her son J.D. J.D. was also petitioner's Power of Attorney (POA). The purchase price was \$379,122.00.

Petitioner liquidated several security or investment instruments in order to execute the purchase. These included:

DWS Investment Account	\$123,460.58
Cash	\$15,011.99
Federated Investment Account	\$86,141.15
Vanguard IRA	\$49,918.88
Series EE Savings Bonds	<u>\$93,884.00</u>
Total	\$368,416.60

(See transmittal, Counsel for petitioner's letter dated September 3, 2015 exhibits B to I).

After settlement, petitioner resided at the Gladwyn Drive residence from February 13, 2012 until 2014 (over two years). Her son J.D. also lived in the same home during the two-year period. J.D. asserts that he provided petitioner with long-term type care from 2012 to 2014, which obviated the need for petitioner to receive care at a nursing facility. Petitioner and her son supported the Medicaid application with letters from petitioner's primary care doctor opining that petitioner required the care provided by her son J.D.

Petitioner was admitted into the hospital in late 2014. Petitioner was discharged from the hospital to a rehabilitation center.

On December 19, 2014, petitioner deeded the Gladwyn home back to her son for less than valuable consideration asserting the caregiver exemption found at N.J.A.C. 10:71-4.10(d)(4).

On March 10, 2015, petitioner filed for Medicaid assistance. Petitioner sought Medicaid eligibility effective March 1, 2015.

On August 24, 2015, the CWA issued the following notice:

This notice is to advise you of the following decision concerning Elizabeth Williams' eligibility for the Medicaid program.

Eligible effective – July 2, 2018

This action was taken because: Applicant, **otherwise, has been found to meet the Nursing Home Medicaid Guidelines for eligibility for March 1, 2015**, but a penalty has been applied for **1,219 days due to a transfer of resources**, resource value, countable resources, exceptional delay for pending documents requested has been applied, therefore, Medicaid eligibility is effective August 2, 2018. Please be sure to report any changes in Elizabeth Williams' circumstances to our Agency.

This action is required by the following regulations: Medicaid Only Manual Selection: 10:71-4.5, 10:71-4.10-3, & 9 (0) 1, 10:71-4.1-2&3, 10:71-2.3 (c) and Deficit Reduction Act of 2005 Public law 109-171, which addresses the issue of eligibility and resources.

Enclosed please find a copy of Penalty Period Calculating Statement concerning the penalty regarding Elizabeth Williams Medicaid Application, which are computed with a Daily rate of \$332.59, which is provided by the State.

Petitioner requested specific details as to the penalty calculation that were lacking in the notice. On August 28, 2015, the CWA The caseworker provided the following breakdown of CMCBOSSE' penalty calculation.

DWS	\$123,460.58
Granddaughter	\$10,000.00
Federated	\$86,141.15
Vanguard	\$49,918.88
Bonds	\$120,578.00
CD	<u>\$15,219.77</u>
Total Penalty	<u>\$405,318.38</u>

Neither the original CWA notice dated August 24, 2015, nor the clarifying E-mail dated August 28, 2015, make any mention of the transfer of petitioner's home to her son

on December 19, 2014. Rather, the notice and E-mail merely reference the liquidation of petitioner's investments in 2012 as the transfer resulting in a 1,219 day transfer penalty. Nor does the notice or E-mail reject petitioner's claim for an exemption under the caregiver provisions found at N.J.A.C. 10:71-4.10(d)(4).

An Office of Administrative Law (OAL) hearing was set for December 3, 2015. Petitioner came prepared to challenge the CWA's conclusion that the liquidation of petitioner's investment assets in 2012 was not a transfer, but rather was a purchase of an asset for full consideration. During the pretrial conference, the CWA asserted that it intended to raise all issues necessary to justify the 1,219 penalty, including the transfer of petitioner's home to her son and a rejection of the caregiver exemption. Petitioner was surprised that the CWA was now challenging all these issues given the vagueness of the August 24, 2015 and August 28, 2015 notices.

In response to the notice confusion, the undersigned ordered the parties to brief the requirements of adequate notice as it applied to the present case.

### **ANALYSIS**

The Medicaid Act (Act), 42 U.S.C.A. §§ 1396 et seq., is a federal and state cooperative program designed to provide medical assistance to persons who are in nursing homes for more than thirty days. The intent of the Act is to provide medical assistance to the aged, blind, or disabled, and to those who lack the income and resources to meet the cost of the necessary medical services. L.M. v. Div. of Med. Assistance & Health Serv., 140 N.J. 480, 484 (1995) (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986)); see Mistrick v. Div. of Med. Assistance & Health Serv., 154 N.J. 158, 165 (1998).

As a participating state in the Medicaid program, New Jersey must ensure that its medical assistance plan complies with federal Medicaid law. Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 501 (1990); Bethphage Lutheran Service, Inc. v. Weicker, 965 F.2d 1239, 1240 (2d Cir. 1992); Caldwell v. Blum, 621 F.2d 491, 494 (2d Cir. 1980). The

Fourteenth Amendment prohibits states from depriving a person of life, liberty, or property without due process of law. The plaintiffs have a protectable "property interest" in their Medicaid benefits under the Fourteenth Amendment. Goldberg v. Kelly, 397 U.S. 254 (1970). Because of this protectable interest, the state must provide the recipient with timely and adequate notice detailing the reasons for a proposed termination, and offer an effective opportunity to defend the adverse action by confronting any witnesses and by presenting arguments and evidence orally, before a recipient's public assistance benefits can be terminated. Id. 397 U.S. at 267-268; Catanzano by Catanzano v. Dowling, 60 F.3d 113, 116 (2d Cir. 1995).

A CWA notice must be fair, timely, and informative. It must include explicit reasons for the CWA decision that deprives someone of a property interest. See, for example N.J.A.C. 10:72-5.1. Notice is fundamental to due process and cannot be dispensed with short cuts or denied where legally required.

Notice is also backstop against parties adding new claims or defenses during the course of the proceeding. More importantly, the OAL is limited to adjudicating only those claims transmitted to it by the parent agency. N.J.A.C. 1:1-3.2(a). And in Medicaid cases, it is the CWA's notice that sets up what claims are transmitted to the OAL.

Federal law also sets minimum notice requirement for Medicaid matters. The Code of Federal Regulations (CFR) states:

42 CFR §435.913 Notice of agency's decision concerning eligibility.

The agency must send each applicant a written notice of the agency's decision on his application, and, if eligibility is denied, the reasons for the action, the specific regulation supporting the action, and an explanation of his right to request a hearing. (See subpart E of part 431 of this subchapter for rules on hearings.)

42 CFR § 431.210 Content of Notice.

A notice required under § 431.206 (c)(2), (c)(3), or (c)(4) of this subpart must contain—

- (a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;
- (b) The reasons for the intended action;
- (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (d) An explanation of—
  - (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
  - (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
- (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 CFR §438.404 - Notice of action.

(a) Language and format requirements. The notice must be in writing and must meet the language and format requirements of § 438.10(c) and (d) to ensure ease of understanding.

(b) Content of notice. The notice must explain the following:

- (1) The action the MCO or PIHP or its contractor has taken or intends to take.
- (2) The reasons for the action.
- (3) The enrollee's or the provider's right to file an MCO or PIHP appeal.
- (4) If the State does not require the enrollee to exhaust the MCO or PIHP level appeal procedures, the enrollee's right to request a State fair hearing.
- (5) The procedures for exercising the rights specified in this paragraph.
- (6) The circumstances under which expedited resolution is available and how to request it.

The Third Circuit addressed the Medicaid notice requirements in Ortiz v. Eichler, 794 F.2d 889 (3d Cir.1986). The Ortiz court found that eligibility notices issued by the Delaware's Department of Health and Social Services (Department) were inadequate because they "failed to explain the reasons for [the Department's] action or to present calculations justifying that action." Id. at 892. The court directed the Department to contain the following information in its notices denying or terminating public benefits:

At a minimum, these notices shall ... 3) provide a detailed individualized explanation of the reason(s) for the action being taken which includes, in terms comprehensible to the claimant, an explanation of why the action is being taken and, if the action is being taken because of the claimant's failure to perform an act required by a regulation, an explanation of what the claimant was required by the regulation to do and why his or her actions failed to meet this standard; and 4) if calculations of income or resources are involved, set forth the calculations used by the agency, including any disregards or deductions used in the calculations, explanations of what income and/or resources the agency considers available to the claimant and the source or identity of these funds, and the relevant eligibility limits and maximum benefit payment levels for a family or assistance unit of the claimant's size.

Id. at 892 (emphasis added). See also, Meyer v. Department of Human Services, 269 N.J. Super. 310 (App. Div. 1993).

Adequate notice detailing the reasons for a proposed action are “necessary to protect claimants against proposed agency action ‘resting on incorrect or misleading factual premises or on misapplication of rules to policies of the facts of particular cases.’” Ortiz at 893 (citing Goldberg v. Kelly, 397 U.S. 254, 268 (1970)).

I **CONCLUDE** that the CWA’s notice does not meet the standards set forth above. The notice makes no mention which transaction resulted in the transfer penalty. The clarifying E-mail seems to suggest that petitioner’s liquidation of her investments in 2012 and the purchase of the Gladwyn Drive home shortly thereafter was the transfer that resulted in the penalty period. The notice makes no mention of petitioner’s transfer of her home to her son in 2014. The Notice offers no analysis of the caregiver exemption even though petitioner asserted eligibility as a caregiver. N.J.A.C. 10:71-4.10(d)(4). Moreover, the CWA made no findings that J.D. failed to meet the criteria as a caregiver during the two-year period he lived with his mother in her Gladwy Drive home.

It is understandable why petitioner came to the hearing only expecting to prove that the liquidation of petitioner's investments followed by the purchase of a home in 2012 was not a transfer justifying a penalty period of 1,219 days. Indeed the 2012 transaction consisted of petitioner purchasing a home for valuable consideration, which is the opposite of a transfer. The purchase price was at, or near, the assessed value. The CWA offered no reasoning in its notice that the purchase price of the home was inflated or contrary to market value (assessed value \$389,700; sales price \$379,122).

In the absence of advance notice to petitioner, it would be unfair and improper to allow the CWA to put forward proofs that the 2014 transfer of petitioner's home to her son was the actual transfer at issue and that the transfer failed to satisfy the caregiver exemption. The CWA's August 24, 2015 and August 28, 2015 notices fail to offer petitioner any advance notice of the CWA's factual basis or legal reasoning as to the caregiver exemption. It results in "trial by ambush" leaving petitioner wholly unprepared to address the CWA's unannounced arguments on the "fly".

The remedy to correct a defective notice is limited. Olde Orchard Village Condo Apartments v. Pequannock Township, 21 N.J. Tax 275, 282 (2004) (holding that even though the notice did not comply with the statutory requirements, the notice was still sufficient). The Supreme Court has stated that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Inadequate notice is a procedural defect that can be cured by a de novo hearing. Appeal of Darcy, 114 N.J. Super. 454, 461 (App. Div. 1971). The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. Matthews v. Eldridge, supra, 424 U.S. at 348. The lack of adequate notice remains a serious deprivation since Medicaid is a protectable property right under the Fourth Amendment. Goldberg v. Kelly, supra. Complicating matters the Medicaid process and regulations has been noted as being less than user friendly. Our Federal Courts have explained when considering Medicaid appeals that:

There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within

human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase."

Rehab. Ass'n of Va., Inc. V. Kozlowski, 42 f.3d 1444, 1450 (4th cir. 1994); See also, Johnson, et al., vs. Michele K. Guhl, Commissioner of the New Jersey Department of Human Services, et al., 91 F. Supp. 2d 754 (2000); Harvard Dultz, Matilda Romagnoli and Michalena Woolley v. Jennifer Velez, Commissioner New Jersey Department of Human Services, et al., 726 F.Supp. 2d 480 (2010).

Thus informative and readable notices are paramount for clients to understand the Medicaid process.

Medicaid planning is permissible so long as the recipient complies with the rules adopted by the program. In Re Keri, 181 N.J. 50, 63-64 (2004). In Keri our Supreme Court adopted the New York approach to Medicaid planning "on the ground that a reasonable and competent person would prefer that the costs of h[er] care be paid by the State, as opposed to h[er] family." Id., at 56. The Supreme Court also has warned that:

Thus, property transfer should **not** be viewed with **skepticism and disapproval** merely because it may precede Medicaid eligibility. Timely transfer of property, even if done to achieve eligibility status, is permissible. Furthermore, planning for the eventuality that Medicaid assistance may be required one day is not the equivalent of collusion to achieve that to which one is not entitled. Review of an individual's entitlement should not be burdened with the suspicion of such duplicity.

H.K. v. Dep't of Servs., Div. of Med. Assistance & Health Servs., 184 N.J. 367, 379-380 (2004); [emphasis added].

The planning device at issue here is the caregiver's exemption. N.J.A.C. 10:71-4.10(d)(4). The caregiver exemption was addressed in M.J. v Division of Medicaid Assistance and Health Services, HMA 2512-07, Initial Decision, (March 25, 2008);

Adopted, Director (June 23, 2008); 2008 N.J. AGEN Lexis 1317 where the Director held the recipient's son delayed institutionalization of his mother (due to Alzheimer's) for two years by providing ongoing assistance with shopping, meal preparation, medication administration and overall looked after her needs. The hearing record was supported by medical records and testimony explaining the recipient needed support in many of her activities of daily living.

Based upon the forgoing, the CWA must 1) supply the petitioner with a revised notice explaining in detail which transactions it contends resulted in a transfer for less than valuable consideration or uncompensated value, and 2) why petitioner was not eligible for the caregiver exemptions notwithstanding any alleged transfers. The notice must contain a factual basis and detailed explanation why petitioner's submissions were rejected including medical reports or statements offered in support of the caregiver exemption. Petitioner may propound some limited discovery, on short notice, including interrogatories or request for admissions. Responses must be supplied at least three days before the next hearing date. The goal is to avoid surprises, level the playing field, and inform petitioner all defenses that the CWA intends to raise that were not in the notice. If petitioner intends to call any medical witness, advance notice of same is required, along with summary of what testimony is expected.

The new Hearing date is February 4, 2016 at 9:30 in Cape May County Courthouse, 9 North Main Street, Hearing Room 228, Cape May Court House, New Jersey 08210.

This order may be reviewed by **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, either upon interlocutory review pursuant to *N.J.A.C. 1:1-14.10* or at the end of the contested case, pursuant to *N.J.A.C. 1:1-18.6*.

December 24, 2015

DATE



W. TODD MILLER, ALJ