



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
150 Maplewood Avenue  
Lewisburg, WV 24901

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

November 30, 2006

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Mr. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 16, 2006. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate benefits under the Long Term Care (LTC) Medicaid Program.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the Long Term Care Medicaid Program is based on current policy and regulations. Some of these regulations state as follows: In order to be eligible for programs administered by the Division of Family Assistance (DFA), the total amount of countable assets cannot exceed certain amounts. The asset level for one person for SSI-Related Medicaid is \$2,000. (Section 11.3 of the West Virginia Income Maintenance Manual)

The information which was submitted at your hearing revealed that the countable assets in this case exceed \$2,000.

It is the decision of the State Hearing Officer to uphold the proposal of the Department to terminate benefits under the LTC Medicaid Program.

Sincerely,

Margaret M. Mann  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
[REDACTED] Esquire  
Susan Godby, DHHR

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES  
BOARD OF REVIEW**

\_\_\_\_\_ by \_\_\_\_\_,

**Claimant,**

v.

**Action Number: 06-BOR-2014**

**West Virginia Department of  
Health and Human Resources,**

**Respondent.**

**DECISION OF STATE HEARING OFFICER**

**I. INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing concluded on November 20, 2006 for \_\_\_\_\_. This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened on November 16, 2006 on a timely appeal, filed May 29, 2006. It should be noted that this hearing was originally scheduled for July 6, 2006. It was rescheduled for September 26, 2006 at the request of the claimant. This date conflicted with a meeting the Department Hearing Representative was required to attend and the hearing was rescheduled for November 16, 2006.

The hearing record was left open in order for the Department to provide clarification in regard to a trust set up for the claimant's disabled son. The State Hearing Officer received this information on November 20, 2006.

It should be noted here that the claimant's benefits have been continued pending the hearing decision.

**II. PROGRAM PURPOSE:**

The Program entitled Long Term Medicaid is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

The program entitled Long Term Care Medicaid (nursing facility services) is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources. It is a medical service which is covered

by the State's Medicaid Program. Payment for care is made to nursing homes which meet Title XIX (Medicaid) standards for the care provided to eligible recipients. In order to qualify for Nursing Home Care, an individual must meet financial and medical eligibility criteria

**III. PARTICIPANTS:**

\_\_\_\_\_, Acting on behalf of \_\_\_\_\_, Claimant  
\_\_\_\_\_  
Esquire, Attorney for the Claimant  
Susan Godby, Department Hearing Representative

Presiding at the Hearing was Margaret M. Mann, State Hearing Officer and a member of the State Board of Review.

**IV. QUESTIONS TO BE DECIDED:**

The question to be decided is if the Department is correct in the decision to terminate benefits under the LTC Medicaid Program as the claimant does not meet the financial requirements.

**V. APPLICABLE POLICY:**

Sections 11.2, 11.3, 17.6 and 17.10 of the West Virginia Income Maintenance Manual  
Kondos v. Board of Regents, 318 F. Supp. 394 (S.D.W.Va.1970), aff'd 441 F.2nd. 1172 (4th Cir. 1971)  
Capehart v. Board of Education, 95 S.E. 838 (1920)

**VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

**Department's Exhibits:**

- D-1 Form IG-BR-29 Hearing/Grievance Record Information
- D-2 Termination Notice dated 05/29/2006
- D-3 Sections 11.3 and Chapter 17 of the Income Maintenance Manual
- D-4 Copy of Quality Assurance Findings dated 06/01/2006
- D-5 Department's Summary

**Claimant's Exhibits:**

- C-1 Settlement Statement dated 08/15/2005
- C-2 Statement of Payments to \_\_\_\_\_ Healthcare dated 08/17/2006
- C-3 \_\_\_\_\_ Trust Agreement dated 02/20/2006

**VII. FINDINGS OF FACT:**

- 1) A LTC Medicaid application was made on behalf of the claimant on 01/23/2006. The caseworker approved the case the same day she took the application. The claimant is a resident at Summers County ARH.

- 2) A Quality Assurance auditor pulled the case for review in February 2006. The reviewer found the case ineligible. The report reads in part: Ms. \_\_\_\_\_ is ineligible for Medicaid benefits due to excessive assets. QA has verified that as of 01/06, Ms. \_\_\_\_\_ had \$107,618 in her bank account. According to her attorney, this money has been used to establish a trust for her and her son in the amount of \$70,000. She also gifted \$10,000 to each of her two daughters and \$5,000 to each of her six grandchildren. The \$70,000 trust was not established until 02/20/06; therefore her assets exceeded the allowable limit as of 02/01/06. (D-4) Testimony revealed it was five grandchildren, not six.
- 3) A letter addressed to \_\_\_\_\_ County ARH was sent 05/18/06 and reads in part: Your (\_\_\_\_\_ ) Nursing Home Care coverage will stop. You will not receive this benefit after May 2006. Reason: The amount of assets is more than is allowed for this benefit. Liquid Assets: \$178082.35. (D-2)
- 4) Testimony from Mr. \_\_\_\_\_ revealed that he is a friend of the family and has handled the financial affairs of the claimant. The claimant's consolidated assets totaled \$107,618. This included money from the sale of her home, savings and the grandchildren's CD's. The claimant had cared for her disabled son prior to becoming incapacitated. She wanted to establish a trust for her son. She also wanted to give her two daughters and grandchildren some money. According to Mr. \_\_\_\_\_'s testimony, he talked to the caseworker on at least five different occasions and intent was discussed. He understood that this was acceptable and correct until the Quality Assurance review. Nothing has been paid for \_\_\_\_\_ from the trust. The claimant's daughters received \$10,000 each and five grandchildren received \$5,000 each and two great grandchildren \$2,000 each. It was his belief that Ms. \_\_\_\_\_'s assets were below \$2,000 when he made the application on January 23, 2006. It was less than a week prior to the date the application was made that he wrote the checks to the daughters and grandchildren.
- 5) Testimony from Ms. Godby revealed that the case was improperly approved in January 2006. There was no information in RAPIDS regarding the assets. The application made on January 23, 2006 cannot be found. A penalty should have been applied for the transfer of assets. \$107,618 minus \$70,000 (if this trust is set up for disabled son as policy dictates) equals \$37,618. \$37,618 divided by \$3380 (monthly cost of care) equals 11.12 month penalty from the date that the asset was transferred.
- 6) The \_\_\_\_\_ Trust (C-3) was established February 20, 2006 in the amount of \$70,000. Trustor, \_\_\_\_\_, and Trustor's son, \_\_\_\_\_, are the Lifetime Beneficiaries of the \_\_\_\_\_ Trust. \_\_\_\_\_ is the Trustee. During the lives of the Lifetime Beneficiaries, the Trustee shall pay each of the Lifetime Beneficiaries a sum of fifty dollars (\$50.00) per month for their support, maintenance, health or welfare. This Trust shall terminate upon the death of the last surviving Lifetime Beneficiary and the Trustee shall distribute the balance of the income and principal, if any, to the Trustor's two great-grandchildren. The Trust is irrevocable.
- 7) The State Hearing Officer requested that the Department get a clarification as to whether or not the trust for the disabled son (C-3) can be excluded as a resource. The response was "no", it could not be excluded.

- 8) The claimant's argument is that the case should not be closed for the following reasons. 1) The trust was established for the claimant's disabled adult son. Ms. \_\_\_\_\_ is entitled to a minimal sum from the trust for sundries and that sort of thing. They are concerned this would be considered income. The trust does not terminate upon the death of Ms. \_\_\_\_\_. The trust terminates upon the death of the last of Ms. \_\_\_\_\_ or her son. 2) The financial gifts given to her children and grandchildren and the creation of the trust were done after consulting with and acting on the advice of an agent of DHHR. 3) The money given to the great-grandchildren (\$4,000) was always in their name and should not be considered. 4) Revoking Ms. \_\_\_\_\_'s Medicaid would create a hardship. The money gifted to her children and grandchildren is gone and little chance she would get that back. The only money left is in the trust. The trust is irrevocable and to revoke and irrevocable trust would involve a court order. All parties would have to agree. The claimant's disabled son is incompetent to make this decision. The claimant could not afford to stay where she is.
- 9) There was no evidence introduced at the hearing to show that the claimant was notified in writing of a transfer of asset penalty. There was no documentation in the record to show the claimant had assets at the time of application.
- 10) Section 17.10 of the West Virginia Income Maintenance Manual reads in part that a nursing home client must meet the asset test for his eligibility coverage group. The asset level for those eligible by having income equal to or less than 300% of the monthly SSI payment for an individual is the same as for an SSI-Related Medicaid eligible. See Chapter 11 for the asset limit of the appropriate coverage group.
- 11) Section 11.3 of the West Virginia Income Maintenance Manual reads in part that to be eligible for programs administered by the Division of Family Assistance (DFA), the total amount of countable assets cannot exceed certain amounts. The asset level for one person for SSI-Related Medicaid is \$2,000.
- 12) Section 11.2A of the West Virginia Income Maintenance Manual reads in part that the asset eligibility determination for SSI-Related Medicaid applications must be made as of the first moment of the month of application. The client is not eligible for any month in which assets are in excess of the maximum, as of the first moment of the month. Increases in countable assets during month do not affect eligibility unless retained into the first moment of the following month. Conversely, if the client's assets, as of the first moment of the month, are within the asset limit, and during the month his assets increase to above the asset limit, he is still eligible for that month.
- 13) Section 17.10 of the West Virginia Income Maintenance Manual discusses the transfer of asset policy for the LTC Medicaid Program.
- 14) Section 17.10 #1 of the West Virginia Income Maintenance Manual defines For the Sole Benefit Of: A transfer is considered to be for the sole benefit of a spouse, disabled child, or a disabled individual under age 65, if the transfer is arranged in such a way that no individual, except the spouse, child or individual, can benefit from the transferred asset(s) in any way, either at the time of the transfer, or at any time in the future, except as provided below. The agreement must be in writing. Similarly, a trust is considered to be established for the sole benefit of one of these individuals if the trust benefits no one but the individual, either at the time of the establishment of the trust, or anytime in the

future, except as provided below. However, the trust may provide for reasonable compensation for a trustee to manage the trust, as well as for reasonable costs associated with investing or otherwise managing the funds or property in the trust..... If a beneficiary is named to receive the funds remaining in a trust upon the individual's death, the transfer is considered made for the sole benefit of the individual if the Department is named as the primary beneficiary for up to the amount paid for services to the individual. The designated beneficiary receives any remaining amount.

- 15) Section 17.10 #5 of the West Virginia Income Maintenance Manual reads that all transfers not specifically excluded from the application of a penalty result in application of a penalty. This also applies to jointly owned resources. The jointly owned resource, or the affected portion of it, is considered transferred by the client when any action is taken, either by the client or any other person, which reduces or eliminates the client's ownership or control of the resource.
- 16) Section 17.10 #8 of the West Virginia Income Maintenance Manual reads in part that the transfer of resources penalty is ineligibility for nursing facility services..... The penalty is applied as follows. The claimant may remain eligible for Medicaid; services not subject to a penalty are paid. The penalty period starts the month in which the resource is transferred, as long as that month does not occur in any other period of ineligibility due to a transfer of resources penalty. If the month the resource is transferred falls into another such penalty period, the penalty period begins the month after the previous penalty period ends.....The penalty period lasts for the number of whole months determined by the following calculation: Total amount transferred during the look-back period divided by the State's average, monthly nursing facility private pay rate ( $\$112.65/\text{day} = \$3,380/\text{month}$ ). The penalty runs continuously from the first day of the penalty period, whether or not the client leaves the institution. There is no maximum or minimum number of months a penalty may be applied. The institutionalized client is affected by any transfer described above when he or his spouse or any entity acting on their behalf or at their direction transfers an asset.
- 17) Section 17.6 of the West Virginia Income Maintenance Manual reads in part that the recipient, his representative and the nursing facility administrator must be notified in advance of any action that results in a change in the level of benefits...

#### **VIII. CONCLUSIONS OF LAW:**

- 1) The asset eligibility determination for SSI-Related Medicaid applications must be made as of the first moment of the month of application. The client is not eligible for any month in which assets are in excess of the maximum, as of the first moment of the month. The asset level for a one person Medicaid AG is \$2,000.
- 2) An application for LTC Medicaid was made on 01/23/2006. Testimony revealed that the claimant transferred assets in December 2005. Included in this money was \$70,000 that was to be set up in a trust for her disabled son. This trust was not set up until February 20, 2006.

- 3) The \_\_\_\_\_ Trust has two beneficiaries, \_\_\_\_\_ and her son. Policy requires that the money transferred for a disabled child must be for the sole benefit of that individual. The \_\_\_\_\_ Trust does not meet this requirement. Policy also requires that the transfer is considered made for the sole benefit of the individual if the Department is named as the primary beneficiary for up to the amount paid for services to the individual. The designated beneficiary receives any remaining amount. The \_\_\_\_\_ Trust does not meet this requirement.
- 4) The \_\_\_\_\_ Trust in the amount of \$70,000 is not an excludable trust.
- 5) The claimant's assets exceed \$2,000.
- 6) Policy requires that the client be notified of any action on their case. At the time of the hearing, no evidence was submitted to show the claimant had been notified in writing of the transfer of asset penalty.
- 7) Un-refuted testimony at the hearing revealed that Mr. \_\_\_\_\_ had discussed Ms. \_\_\_\_\_'s financial eligibility with a caseworker at DHHR and was lead to believe disposing of the money in a trust and gifts to family members was acceptable. The rule in State government is that when a state employee exceeds his/her authority, the State cannot be held liable. It has long been firmly established in West Virginia that the state may not be held liable for illegal or unauthorized acts of its officers. *Kondos v. Board of Regents*, 318 F. Supp. 394 (S.D.W.Va.1970), aff'd 441 F.2<sup>nd</sup>. 1172 (4<sup>th</sup> Cir. 1971) Also, one dealing with a public officer must inform himself as to his authority. The public will be bound by the acts of a public officer only so far as he possesses authority to act. *Capehart v. Board of Education*, 95 S.E. 838 (1920).
- 8) While the alleged action of the employee is questionable, the State Hearing Officer has no authority to reverse the proposed action on this case based on the employee's decision to approve the case in error.

## **IX. DECISION:**

It is the finding of the State Hearing Officer that the Department is upheld in the decision to terminate the claimant's benefits under the LTC Medicaid Program because of excessive assets. The way the case was handled has caused concern for the individuals working with the family. However, the fact the claimant had excessive assets at the time of application cannot be ignored. The action described in the notification letter dated May 18, 2006 will be taken. The Department needs to determine if a transfer of asset penalty should be applied. If the penalty is to be applied, determine the amount of months and send proper notice to the claimant. If the claimant disagrees with the decision outlined in the notice, a hearing can then be requested on that issue.

## **X. RIGHT OF APPEAL:**

See Attachment

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this 30th Day of November, 2006.**

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**Margaret M. Mann  
State Hearing Officer**