

11/22/2017

[REDACTED]

APPELLANT

v.

DEPARTMENT OF HEALTH &

MENTAL HYGIENE

\* BEFORE JAMES T. MURRAY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: DHMH-MCP-11A-17-15338

\* \* \* \* \*

**DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSION OF LAW  
ORDER

**STATEMENT OF THE CASE**

On April 4, 2017, the Department of Health and Mental Hygiene (Department)<sup>1</sup> denied [REDACTED]'s (Appellant) plan of service to continue in the Community First Choice (CFC) program because she did not reside in a community setting and her care provider did not meet other CFC requirements. On April 28, 2017, the Appellant filed a request for a hearing. Code of Maryland Regulations (COMAR) 10.01.04.02A.

On October 30, 2017, I held a hearing at the Office of Administrative Hearings (OAH) in [REDACTED] Maryland. COMAR 10.01.04.06. The Appellant was represented by her niece, [REDACTED]<sup>2</sup> Vanessa Yanson, Assistant Attorney General, represented the Department.

The contested case provisions of the Administrative Procedure Act, the procedures for Fair Hearing Appeals under the Maryland State Medical Assistance Program, and the Rules of

<sup>1</sup> On July 1, 2017, the Department of Health and Mental Hygiene became the Maryland Department of Health. I will refer to the agency as the Department.

<sup>2</sup> The Appellant's niece is the Appellant's attorney-in-fact and has specific authorization to represent the Appellant in this matter.

Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 10.01.04; COMAR 28.02.01.

### ISSUE

Did the Department properly disapprove the Appellant's continued participation in the CFC program because she does not reside in a community setting?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on behalf of the Department:

- |              |  |
|--------------|--|
| Dept. 1      | Webpages for [REDACTED]<br>[REDACTED] Assisted Living, undated (sic)   |
| Dept. 2      | Webpages for [REDACTED] Assisted Living, undated   |
| Dept. 3      | [REDACTED] Resident Agreement for [REDACTED] Assisted<br>Living, beginning November 2012   |
| Dept. 4      | [REDACTED] Resident Agreement<br>Addendum Disclosure, July 1, 2015 (sic)   |
| Dept. 5      | Department Contact information for [REDACTED] Assisted Living and<br>[REDACTED] undated  |
| Dept. 6      | Community Setting Questionnaire, decision date of April 17, 2017   |
| Dept. 7      | Appellant appeal packet: <ul style="list-style-type: none"><li>- Letter of Appeal, April 28, 2017</li><li>- Letter from [REDACTED] to Appellant, April 19, 2017</li><li>- Authorized Representative Form, April 28, 2017</li><li>- Department License issued to [REDACTED]</li><li>- Printout from the Maryland Department of Assessment and Taxation,<br/>printed April 29, 2017</li><li>- Corporate Charter Approval Sheet, July 31, 2002</li><li>- Corporate Articles of Amendment, undated, with fax cover sheet</li></ul> |
| Dept. Ex. 8  | HCBS Survey and Corrective Action Plan, July 7, 1017 <sup>3</sup>  |
| Dept. Ex. 9  | Waiver: Request for Reconsideration For Community Settings HCBS<br>Survey, [REDACTED] Manager, August 5, 2016  |
| Dept. Ex. 10 | [REDACTED] Resident Agreement, September 1, 2016   |

The Appellant offered the following exhibits, which were admitted into evidence:

- |        |   |
|--------|---|
| App. 1 | Waiver: Request for Reconsideration For Community Settings HCBS<br>Survey, [REDACTED] Manager, August 5, 2016 |
| App. 2 | Pamphlet for [REDACTED] undated   |

<sup>3</sup> The acronym HCBS stands for "home and community based services."

## Testimony

[REDACTED] and [REDACTED] testified on behalf of the Appellant.

Rebecca Oliver, Health Policy Analyst, testified for the Department.

## FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Appellant has participated in the CFC program since the program's inception in 2014. During that period she has always resided at [REDACTED] in [REDACTED].

2. [REDACTED] is a three-bed licensed assisted living facility owned by [REDACTED]. The Licensee is [REDACTED].

3. [REDACTED] and [REDACTED] are separately licensed assisted living facilities located next door to each other. They are licensed as assisted living facilities in the name of two different corporations, but marketed and operated as a single entity. Since at least 2002, [REDACTED] has held itself out to be a single assisted living facility.

4. [REDACTED] is a three-bed licensed assisted living facility owned by [REDACTED]. It is located at [REDACTED] next door to [REDACTED].

5. The Appellant has resided at [REDACTED] since 2012 under the same lease agreement.

6. [REDACTED] is the only shareholder in [REDACTED] a close corporation formed in 2002.

7. [REDACTED] is the only shareholder in [REDACTED] a close corporation formed in 1998.

8. The lease provides, among other things:<sup>4</sup>

- Resident will be admitted on a thirty-day trial basis to determine if the arrangement is in the best interest of both parties, at which time the arrangement may be terminated by either party. Rent for the trial period is nonrefundable.
- Services provided: laundry and housekeeping
- Residents' responsibilities: no food to be stored in bedroom

9. The House Rules provide, among other things:<sup>5</sup>

- Snacks available "24/7 per MD ordered diet"
- All food items are to be stored in the kitchen (for hygiene and housekeeping reasons no food is to be stored in bedrooms)
- For safety of the residents, the facility is equipped with door sensors, motion sensors and security cameras outside and common areas monitored only by management
- Management would like to be given three days advance notice of scheduled leaves of absence to ensure medication and clothing are sufficiently prepared.
- A waiver form is available if you choose to reserve your right not to participate in scheduled daily activities/day programs
- Keys are available with adequate documentation "from MD" that resident is competent and safe to enter and exit facility independently
- Cooking items, electrical appliances/tools are not allowed in bedrooms unless approved by management and housekeeping reserves the right to enter rooms with proper notice /consent for regular cleaning/maintenance

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<sup>4</sup> I have only listed the lease terms that are relevant to the issues in this appeal.

<sup>5</sup> I have only listed the House Rules that are relevant to the issues in this appeal.

- If it becomes necessary to change your bed [or] room, you will be given five days advance notice and ability to participate in the process of choosing a room/roommate

10. The [REDACTED] lease agreement does not address Maryland's landlord/tenant law in that it does not state that the eviction process and appeals rights provided under State law are applicable to the agreement.

### DISCUSSION

Federal Medicaid law permits a state to provide home and community-based services to certain individuals through the CFC option. 42 U.S.C.A. § 1396n(k)(1) (Supp. 2017); 42 C.F.R. § 441.500(a) (2016). An individual is eligible for CFC services if the state has determined: (1) the individual requires an institutional level of care that would make them eligible for nursing facility services under the state's Medicaid plan; and (2) but for the provision of home and community-based services, the individual would require the level of care provided in a nursing facility, the cost of which could be reimbursed under the state's Medicaid plan, known as Medical Assistance in Maryland. 42 U.S.C.A. § 1396n(k)(1); 42 C.F.R. § 441.510(c) (2016); COMAR 10.09.84.01.

Additionally, to be eligible for CFC services a participant must reside at home in a community setting. COMAR 10.09.84.04A(3). "Community setting" does not include hospitals, nursing facilities, or other institutions. COMAR 10.09.84.02B(9)(b). An "institution" means an establishment that furnishes food, shelter, and some treatment or services to four or more individuals unrelated to the proprietor. COMAR 10.09.84.02B(14).

Home and community-based settings must be integrated in and provide a participant full access to the greater community. A participant must have the opportunity to seek employment and work in competitive integrated settings, engage in community life, control personal resources,

and to receive services in the community. The setting must ensure the participant's rights of privacy and freedom from coercion and restraint. The setting must optimize, and not regiment, the participant's individual initiative and independence in making choices related to daily activities, physical environment, and with whom to interact. The setting must facilitate individual choice regarding services and supports, and who provides them. 42 C.F.R. § 441.710(a)(1)(i)-(v); COMAR 10.09.84.02B(9)(a).

If a CFC participant lives in a provider-owned residential setting, the unit must be a specific physical place rented or occupied under a legally enforceable agreement and the participant must have the same protections from eviction that tenants have under the landlord/tenant law of the state. If the landlord/tenant laws do not apply to the setting, then the state must require that a lease, residency agreement, or other form of written agreement provides protections that address the eviction process and appeals comparable to those provided under the state's landlord/tenant law. 42 C.F.R. § 441.710(a)(1)(vi)(A).

Maryland law provides that a written lease is required if the landlord offers five or more dwelling units for rent in the State. Md. Code Ann., Real Prop. § 8-208(a)(1) (Supp. 2016). The law further provides processes and appeals related to security deposits, nonpayment of rent, notices to quit tenancy, and proceedings upon breach of the lease. Md. Code Ann., Real Prop. §§ 8-203, 8-401, 8-402, 8-402.1 (2015 & Supp. 2016).

There is no clear statutory or regulatory authority establishing which party bears the burden of proof in this case. *See* COMAR 10.01.04.01 through 10.01.04.12 (procedural rights, advice, and notifications). Under State common law principles, the burden of proof lies with the party asserting the affirmative of an issue before an administrative body. *Md. Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996). Here, the Department is asserting the affirmative and has the burden of proof to demonstrate it properly terminated the Appellant's

participation in the CFC program. As explained below, I find the Department has met its burden and I will affirm the Department's action.

Rebecca Oliver, Health Policy Analyst, testified for the Department. She stated that some neighborhood homes may be considered a community setting and others not. The first issue is whether the home has three or fewer beds. Based on COMAR, a facility with more than three beds is an institution and cannot qualify as a community setting. She explained that groups or clusters of neighborhood homes in close proximity with one another may be considered a single facility under the CFC program. Another issue that helps determine whether a residential home is a community based setting is the amount of self-determination enjoyed by the residents. CFC participants are more independent than residents in more traditional assisted living facilities: they have more freedom to come and go as they please, structure their own activities and maintain their own schedules. CFC participants cannot be subject to generalized restrictions. If a facility is determined not to be a community setting, it may not provide CFC services.

Regarding [REDACTED] Ms. Oliver testified that it is not a community based setting for several reasons. First, [REDACTED] are right next to each other and operated as one facility; thus, it has more than three beds and cannot qualify as community setting for that reason. Additionally, according to Ms. Oliver, [REDACTED] does not meet other requirements of a community setting because it limits the freedom of its residents too much and the Appellant's lease does not conform to Maryland landlord tenant law. She pointed out the Appellant's lease provides a thirty day "trial period" during which the lease can be terminated by the facility, with no refund of rent; food is not available twenty-four hours per day, seven days per week; there is a 7:00 p.m. bedtime for all residents; electric devices are not allowed in residents' rooms; residents cannot have keys to the facility; there is no disclosure to residents that they may be watched on security cameras; and there are no locks on the bathrooms. Ms. Oliver stated that these are all

requirements under federal or Maryland law for a community setting. Finally, Ms. Oliver stated even if [REDACTED] corrected the other deficiencies, it still would not meet CFC requirements because the Department believes [REDACTED] are essentially the same facility and therefore it has more than three beds. In either case, the Appellant would be required to reapply to participate in the CFC program.

Upon questioning by Ms. [REDACTED] Ms. Oliver acknowledged that she has never met the Appellant and has not visited [REDACTED]. She stated that she based her testimony, in part, on answers to a questionnaire provided by the facility's management. She explained that a support planner met with a representative of the facility about the responses. The Appellant was present at the meeting when the questionnaire was completed and did not disagree with anything that occurred. She conceded that she did not know the Appellant could not speak.

[REDACTED] testified that he is the owner of [REDACTED] and lives there. He said [REDACTED] is a licensed assisted living facility and he does not own any other assisted living facilities. He explained that he and Mrs. [REDACTED] are married but are separated. Mr. [REDACTED] maintained that just because [REDACTED] are together in ads as a marketing strategy does not make the two houses a single assisted living facility.

Mr. [REDACTED] denied that residents' rooms or the bathrooms do not have locks. He also denied that all residents are required to go to bed at 7:00 pm as Ms. Oliver stated. Mr. [REDACTED] explained that after the evening meal residents are free to spend their time as they choose. For health reasons, residents are not allowed to store food in their rooms; all food is kept in the kitchen. However, residents may eat any time they want. If residents want to cook, they must go to the kitchen. Mr. [REDACTED] explained the language in the lease that "snacks are available 24/7 per MD ordered diet" simply means that special snacks ordered by a physician are available 24/7, not that only snacks ordered by a physician are available 24/7.



Mr. [REDACTED] related that there are cameras on the premises for security reasons, but they are outside. Mr. [REDACTED] also testified that residents may participate in, or cancel participation in, activities at any time. He noted that all of the residents at [REDACTED] are in wheelchairs so he needs to know in advance who is going on an outing so that he can arrange for proper transportation. He pointed out that people in wheelchairs have very special needs regarding transportation. As to electrical appliances in bedrooms, those items are not allowed because they pose a fire hazard; however residents may certainly have other appliances such as televisions and radios. Mr. [REDACTED] testified that he must be able to access residents' rooms, after getting the resident's permission, in order to thoroughly clean the rooms and perform routine maintenance. On the questionnaire, he answered that residents cannot choose roommates because they do not have roommates, each resident has his or her own room.

Finally, Mr. [REDACTED] said three Department personnel visited [REDACTED] in July, but never suggested any problems and he has never received any feedback from the Department. He complained that the Department is always sending mail for him to the wrong address and calls him at the wrong phone number.

[REDACTED] testified that she is an assisted living consultant and the owner of [REDACTED]. Mrs. [REDACTED] acknowledged that [REDACTED] are listed together in ads, but said the ads were old. She stated that the two facilities are separate and the Appellant resides at [REDACTED] not [REDACTED].

On cross examination, Mrs. [REDACTED] conceded that she has worked at [REDACTED] during the past year, but explained she was just filling in when not enough regular staff were available. She also acknowledged that she, not Mr. [REDACTED] participated in the meeting when Department staff visited [REDACTED] however, she was acting in a consulting capacity at the meeting.

The great weight of evidence in the record establishes that [REDACTED] were, when the Department made the decision under appeal, essentially operating as a single entity. The two facilities are in close proximity; they are right next door to one another. Their advertisements on social media refer to [REDACTED] and welcome viewers to [REDACTED]. The description uses the pronoun "we" and the plural "our team of experts," "our residents," and "our customized approach" throughout. The location is described as [REDACTED] Dept. Ex. 1. The Appellant's lease is captioned [REDACTED] but at the bottom both addresses are listed. Dept. Ex. 3. The same is true of the House Rules, which also lists both addresses below the caption and bears the electronic signature [REDACTED] Dept. Ex 4. Moreover, except for the caption, the wording of both facilities' documents is identical. See Dept. Ex. 10. Mrs. [REDACTED] conceded that she sometimes works at [REDACTED]. Also, Mrs. [REDACTED] not Mr. [REDACTED] was present at [REDACTED] for the July meeting with Department staff.

The [REDACTED] contend that the advertisements presented by the Department are just marketing and are old. Yet according to Ms. Oliver, they were printed after the Department had made its decision in the Appellant's case. No more recent advertisements were presented on behalf of the Appellant. The Appellant did present a brochure and a lease for [REDACTED]. The brochure mentions only [REDACTED] and [REDACTED] at [REDACTED]. There is no reference to [REDACTED]. I give this document little weight with regard to whether [REDACTED] and [REDACTED] were operating separately when the Department made the determination that resulted in this appeal. No evidence was presented as to when it was produced and it is not dated.

Mr. [REDACTED] testified that he is the "owner" of [REDACTED]. Likewise, Mrs. [REDACTED]'s corporation appears to be the licensee for [REDACTED]. Mr. [REDACTED] contends that because each facility is separately licensed, the two homes cannot be considered a single entity. This reasoning

is flawed. Like individuals, corporations may engage in joint ventures, which appears to be how the [REDACTED] assisted living facilities are operated. It is clear that [REDACTED] and [REDACTED] are closely linked and hold themselves out to be a single entity, or at least did so at the time the Department made its decision. Accordingly, [REDACTED] is an "institution," not a community based setting because it provides food, shelter, and some treatment or services to four or more individuals unrelated to the proprietor. COMAR 10.09.84.02B(14). Thus, the Department properly denied the Appellant's plan of service to continue in the CFC program because she was not residing in a community setting.

The Appellant's representative presented convincing evidence that the Appellant is able to eat whenever she wants, has a lock on her room and the bathroom for privacy, and generally may set her own schedule. She has the right of self-determination for many things. The lease contains a notice regarding the use of cameras. I also agree that, in this context, a roommate means a person with whom one shares a room, not a housemate. Conversely, the Appellant cannot have a key to the house unless approved by a physician. Therefore, the Department properly determined that [REDACTED] cannot be deemed a community setting for this reason as well.

For the reasons stated above, the Appellant is not eligible to participate in the CFC program while residing at [REDACTED]. Even if [REDACTED] corrected the deficiencies mentioned above, the Appellant would be required to reapply to participate in the CFC program.

#### **CONCLUSION OF LAW**

Based on the Findings and Discussion above, I conclude the Department properly disapproved the Appellant's participation in the CFC program because she does not reside in a community setting. 42 C.F.R. § 441.710(a)(1)(vi)(A); COMAR 10.09.84.04A(3).

## ORDER

I **ORDER** that the decision of the Department is **AFFIRMED**.

Signature Appears on Original

November 22, 2017

Date Decision Issued

James T. Murray  
Administrative Law Judge

JTM/ac  
#170714

## REVIEW RIGHTS

This is the final decision of the Maryland Department of Health. A party aggrieved by this final decision may file a written petition for judicial review with the Circuit Court for Baltimore City, if any party resides in Baltimore City or has a principal place of business there, or with the circuit court for the county where any party resides or has a principal place of business. Md. Code Ann., State Gov't § 10-222(c) (Supp. 2017). The original petition must be filed in the circuit court within thirty days of the date of this decision, with a copy to David Lapp, Office of the Attorney General, Suite 302, 300 W. Preston St., Baltimore, MD 21201. Md. Rules 7-201 through 7-210.

The petition for judicial review should identify the Maryland Department of Health, which administers the Medicaid program, as the agency that made the decision for which judicial review is sought. The address of the Maryland Department of Health should be included on the petition: 201 W. Preston St., Room 511C, Baltimore, MD 21201.

A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. No fees may be charged to Medical Assistance Program recipients, applicants, or authorized representatives for transcription costs or for preparation or delivery of the record to the circuit court.

The Office of Administrative Hearings is not a party to the judicial review process.

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