

██████████,

APPELLANT

v.

MARYLAND DEPARTMENT OF

HEALTH

* BEFORE RICHARD O’CONNOR,

* ADMINISTRATIVE LAW JUDGE,

* THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH No.: MDH-MCP-11A-23-30210

* * * * *

DECISION

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STATEMENT OF THE CASE

On October 5, 2023, the Maryland Department of Health (Department) notified the Appellant that he was no longer eligible for Medical Assistance services through the Community First Choice program because he did not live in a community setting. The Appellant filed a request for a hearing on October 13, 2023. Code of Maryland Regulations (COMAR) 10.01.04.02A(4).

I convened a hearing on January 12, 2024, by videoconference. COMAR 10.01.04.06; COMAR 28.02.01.20B(1)(b). The Appellant did not appear for the hearing. ██████████ Assistant Attorney General, represented the Department. I waited more than fifteen minutes for the Appellant or someone representing him to appear.

Reviewing the file, I determined that, on November 29, 2023, the Office of Administrative Hearings (OAH) sent a Notice of Remote Hearing to the Appellant at his address of record informing him that a hearing would be held at 9:00 a.m. on January 12, 2024, on the Webex videoconference platform and including the meeting number and instructions for joining the hearing. The United States Postal Service did not return the notice to the OAH undelivered. The Appellant did not request a postponement of the hearing or waive his presence.

After determining that the Appellant had received proper notice of the hearing and had failed to appear, I inquired of the Department how it wished to proceed. COMAR 28.02.01.23A, part of the OAH's Rules of Procedure, provides:

If, after receiving proper notice as provided in Regulation .05C of this chapter, a party fails to attend or participate, either personally or through a representative, in a prehearing conference, hearing, or other stage of a proceeding, the [administrative law judge] may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party.

The Department requested that the hearing proceed in the Appellant's absence, and the hearing went forward accordingly.

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 Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 10.01.04; COMAR 28.02.01.

ISSUE

Is the Appellant ineligible for Medical Assistance services through the Community First Choice program because he does not reside in a community setting?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Department:

Dept. Ex. 1. Community Settings Questionnaire, October 4, 2023.

Dept. Ex. 2. Hearing Summary, undated.

The Appellant did not submit any exhibits for inclusion in the record.

Testimony

██████████, whom I accepted as an expert in compliance with Medicaid community settings regulations, testified on behalf of the Department.

No witnesses testified on behalf of the Appellant.

FINDINGS OF FACT

Based on the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all relevant times, the Appellant received Medical Assistance services through the Community First Choice program.
2. As of October 4, 2023, the Appellant was living in a ██████████ hotel in ██████████, Maryland.
3. The Appellant did not choose the hotel as his residence.
4. The Appellant did not feel he was independent in making life choices at the hotel.
5. The hotel room was not physically accessible for the Appellant.

6. The Appellant did not have a lease or another legally enforceable contract or agreement covering his stay at the hotel.

7. The Appellant's residence is not a provider-owned or controlled residential setting.

DISCUSSION

Burden of Proof

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. Md. Code Ann., State Gov't § 10-217 (2021); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered.

Coleman v. Anne Arundel Cnty. Police Dep't, 369 Md. 108, 125 n.16 (2002).

Because the Department is terminating benefits that the Appellant has been receiving, it bears the burden to show by a preponderance of the evidence that its determination that the Appellant is no longer eligible for Community First Choice services is correct. COMAR 28.02.01.21K(1)-(2)(a).

Analysis

The Department's evidence in this case essentially comes from the Community Settings Questionnaire of October 4, 2023, and Ms. [REDACTED]'s expert interpretation of the information provided on that form. The Department contends that the Appellant does not (or did not at the time of the notice of termination) live in a community-based setting because he resides in a hotel.

COMAR 10.09.84.04A(3) states that to participate in Community First Choice, an individual must “reside at home.” COMAR 10.09.84.02B(13) defines “home”:

(13) Home.

(a) “Home” means the participant’s place of residence in a community setting.

(b) “Home” does not mean:

(i) An assisted living program as defined in COMAR 10.07.14;

(ii) A residential rehabilitation program licensed as a therapeutic group home under COMAR 10.21.07;

(iii) An alternative living unit, group home, or individual family care home as defined in COMAR 10.22.01;

(iv) Community-based residential facilities for individuals with intellectual or developmental disabilities licensed under COMAR 10.22.02; or

(v) Any other provider-owned or controlled residence.

As the Appellant’s “place of residence,” a hotel room could be his home under the above definition if it is “in a community setting.” The underlying question is whether the Appellant’s residence meets the criteria of a community setting.

Title 42, section 441.530(a)(1) of the Code of Federal Regulations (C.F.R.) does not specifically define “community-based setting” but provides an explanation of the qualities necessary for a living arrangement to be considered a community-based setting, as follows:

(a) States must make available attendant services and supports in a home and community-based setting consistent with both paragraphs (a)(1) and (a)(2) of this section.

(1) Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:

(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

(ii) The setting is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.

(iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(iv) Optimizes but does not regiment individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

(v) Facilitates individual choice regarding services and supports, and who provides them.

(vi) In a provider-owned or controlled residential setting, in addition to the above qualities at paragraphs (a)(1)(i) through (v) of this section, the following additional conditions must be met:

(A) The unit or dwelling is a specific physical place that can be owned, rented or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

(B) Each individual has privacy in their sleeping or living unit:

(1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors as needed.

(2) Individuals sharing units have a choice of roommates in that setting.

(3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

(C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.

(D) Individuals are able to have visitors of their choosing at any time.

(E) The setting is physically accessible to the individual.

(F) Any modification of the additional conditions, under paragraphs (a)(1)(vi)(A) through (D) of this section, must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

- (1) Identify a specific and individualized assessed need.
- (2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
- (3) Document less intrusive methods of meeting the need that have been tried but did not work.
- (4) Include a clear description of the condition that is directly proportionate to the specific assessed need.
- (5) Include regulation collection and review of data to measure the ongoing effectiveness of the modification.
- (6) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
- (7) Include the informed consent of the individual.
- (8) Include an assurance that interventions and supports will cause no harm to the individual.

Paragraph (a)(2) of the above regulation describes the settings that are not community-based, which are nursing facilities, hospitals, and other institutions. Hotels are not mentioned in paragraph (a)(2).

COMAR 10.09.84.02B(9) defines a community setting as follows:

(9) Community Setting.

(a) “Community setting” means the area, district, locality, neighborhood, or vicinity where a group of people live which provides participants with opportunities to:

- (i) Seek employment and work in competitive integrated settings;
- (ii) Engage in community life;
- (iii) Control personal resources; and
- (iv) Receive services.

(b) “Community setting” does not mean:

- (i) Hospitals;
- (ii) Nursing facilities;
- (iii) Institutions for mental diseases;
- (iv) Intermediate care facilities for individuals with intellectual disabilities; or
- (v) Other institutions.

The Community Settings Questionnaire states that it was created by [REDACTED] after a site visit on October 4, 2023. In response to the question “Did the participant choose the residence?” the response given was “No” with the explanation “Setting was chosen by social worker.” Dept. Ex. 1.

The answer “No” was also provided to each of the following questions:

4. Does the participant feel they are independent in making life choices (with or without the assistance of a chosen representative)?
7. Does the participant have a lease or other legally enforceable agreement?
11. Is the setting physically accessible for the participant?

Dept. Ex. 1.

Because she performed a site visit, one may reasonably assume that Ms. [REDACTED] spoke with the Appellant and observed his living arrangements. The answer to question 4, above, must have come from the Appellant, as Ms. [REDACTED] would have no way of knowing his feelings about independence. The information that a social worker chose the residence may have come from the Appellant or another source. Whether the residence is physically accessible could be determined by observing the Appellant’s physical condition and the layout of the hotel and the room where he was residing. Finally, Ms. [REDACTED] could easily determine that the Appellant did not have a lease or other legally enforceable agreement governing his stay in the hotel. There is, therefore, no reason to doubt the information provided in the Community Settings Questionnaire.

The Department’s position is that the Appellant’s residence at [REDACTED] does not meet four of the criteria for a community-based setting under 42 C.F.R. § 441.530: the Appellant did not choose it, he does not feel independent there, it is not physically accessible to him, and he does not have a lease or other legally enforceable agreement to reside there.

The Appellant, having failed to appear for the hearing, did not present evidence contradicting or challenging the information on the Community Settings Questionnaire.

A preponderance of the evidence shows that three of the Department's concerns are valid. Ms. [REDACTED]'s observations and the Appellant's answers to the questionnaire's inquiries establish that he did not choose the [REDACTED] as his residence, he does not feel independent there, and it is not physically accessible to him. As stated previously, absent any evidence to the contrary, there is nothing that suggests that the information on the Community Settings Questionnaire is not correct.

The fourth criterion relied on, that the Appellant does not have a lease or other legally enforceable agreement, does not apply in this situation. 42 C.F.R § 441.530(a)(1)(vi)(A), set forth above, states that in "a provider-owned or controlled residential setting" the premises must be "owned, rented or occupied under a legally enforceable agreement by the individual receiving services." "Provider" is defined in COMAR 10.09.36.01B(19) as follows:

(19) "Provider" means:

- (a) An individual, association, partnership, corporation, unincorporated group, or any other person authorized, licensed, or certified to provide services for Program participants and who, through appropriate agreement with the Department, has been identified as a Program provider by the issuance of an individual account number;
- (b) An agent, employee, or related party of a person identified in §B(19)(a) of this regulation; or
- (c) An individual or any other person with an ownership interest in a person identified in §B(19)(a) of this regulation.

Ms. [REDACTED] testified that the [REDACTED] where the Appellant resided was not being used as a homeless shelter. Nothing in the evidence suggests that the [REDACTED] or its corporate parent was authorized, licensed, or certified to provide services to Community First Choice participants.

Therefore, the Appellant’s residence was not owned or controlled by a provider, and there is no requirement that the Appellant have a lease or other legally enforceable agreement.

Nevertheless, there is sufficient credible evidence in the record to establish that the Appellant’s residence at [REDACTED] is not a community-based setting. The Appellant’s residence does not include three of the qualities necessary under section 441.530(a)(1) to be considered a community setting.

CONCLUSION OF LAW

Based on the Findings of Fact and Discussion above, I conclude that the Appellant was not eligible for Community First Choice services at the time of the Department’s determination because he did not reside in a community-based setting. 42 C.F.R. § 441.530 (2023); COMAR 10.09.84.02B(9).

ORDER

I **ORDER** that the decision of the Maryland Department of Health to terminate the Appellant’s participation in Community First Choice be, and is hereby, **AFFIRMED**.

January 24, 2024
Date Decision Issued

ROC/sh
#209523

Signature Appears on Original
[REDACTED]

Richard O’Connor
Administrative Law Judge

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(a), (c) (2021). The petition must be filed in the circuit court within thirty (30) days of the date of this decision, with a copy to [REDACTED], 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 545A-2, Baltimore, MD 21201, Attn: [REDACTED].

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 participants, 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.

Copies Mailed To:

[REDACTED]
[REDACTED]
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[REDACTED]
[REDACTED]
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FILE EXHIBIT LIST

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