STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: November 2, 2015
[redacted]
AGENCY: Suffolk
FH #: 7166967M

In the Matter of the Appeal of

[redacted]

from a determination by the Suffolk County Department of Social Services

DECISION AFTER FAIR HEARING

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on November 25, 2015, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Social Services Agency

Ms. Murphy, Fair Hearing Representative

ISSUE

Was the Agency's October 14, 2015 determination to deny the application for Medical Assistance for Appellant on the grounds that the Appellant has non-exempt resources which exceed the applicable Medical Assistance resource levels correct?

Was the Agency's November 13, 2015 determination to deny the application for Medical Assistance for Appellant on the grounds that the Appellant has non-exempt resources which exceed the applicable Medical Assistance resource levels correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 87, was admitted to a local skilled nursing facility on June 5, 2015 as a permanent placement after a hospital stay

2. Prior to her admission, the Appellant resided at a local assisted living facility beginning July 24, 2014.

3. On September 29, 2015, the Agency received Appellant's application for Medicaid, including skilled nursing coverage.

4. By Notice dated October 14, 2015, the Agency informed the Appellant of its determination to deny the Appellant's Medical Assistance application on the grounds that the Appellant has non-exempt resources which exceed the applicable Medical Assistance resource levels.

5. By superseding Notice dated November 13, 2015, the Agency informed the Appellant of its determination to deny the Appellant's Medical Assistance application on the grounds that the Appellant has non-exempt resources which exceed the applicable Medical Assistance resource levels and incurred nursing facility bills for August, 2015 through October 2015 and ongoing.

6. The Agency determined the Appellant's non-exempt excess resources for the purposes of computing Medical Assistance eligibility as follows:

Equity Value Property-[redacted]		$350,000.00
Account 0403		$20,435.91
Account 7206		$ 4,608.22
Total		$350,044.13
	Less funeral preplan	$ 12,000.00
	Countable Resources	$338,044.13

7. The Appellant incurred nursing facility bills for August,2015 through October 2015 as follows:

August 2015	$440 per day x 31 days	$13,640.00
September 2015	$440 per day x 30 days	$13,200.00
October 2015	$440 per day x 31 days	$13,640.00
	Total	$40,480.00

8. The Agency determined that the Appellant's countable resources, less the applicable resource level, exceeded the incurred nursing facility bills in each month for August through October 2015 and ongoing.

9. On November 2, 2015, the Appellant requested this fair hearing.

APPLICABLE LAW

A person who is sixty-five years of age or older, blind or disabled who is not in receipt of Public Assistance and has income or resources which exceed the standards of the Federal Supplemental Security Income Program (SSI) but who otherwise is eligible for SSI may be eligible for Medical Assistance, provided that such person meets certain financial and other eligibility requirements under the Medical Assistance Program. Social Services Law Section 366.1(c)(2).

To determine eligibility, an applicant's or recipient's net income must be calculated. In addition, resources are compared to the applicable resource level. Net income is derived from gross income by deducting exempt income and allowable deductions. The result - net income - is compared to the statutory "standard of need" set forth in Social Services Law Section 366.2(a)(7) and 18 NYCRR Subpart 360-4. If an applicant's or recipient's net income is less than or equal to the applicable monthly standard of need, and resources are less than or equal to the applicable standard, full Medical Assistance coverage is available.

If the applicant's or recipient's resources exceed the resource standards, the applicant or recipient will be ineligible for Medical Assistance until he/she incurs medical expenses equal to or greater than the excess resource standards. 18 NYCRR 360-4.1. The applicant or recipient will be given 10 days from the date he or she is advised of the excess resource amount to reduce the excess resources by establishing a burial fund. In addition, they will be advised that they may spend excess resources on exempt burial space items during this 10 day period. 91 ADM-17

Administrative Directive 91 ADM-17 advises local districts of procedures for the treatment of Medical Assistance applications in cases where an applicant/recipient has resources in excess of the applicable resource standard. Potential MA eligibility for all applicant/recipients who have resources above the applicable resource standard must be investigated when applicant/recipients have outstanding medical bills. Eligibility determinations must include a snapshot comparison of excess resources as of the first of the month to viable bills. This comparison must be done for each month in which eligibility is sought, including each of the retroactive months. The client is not eligible until the amount of viable bills is equal to or greater than the amount of excess resources remaining after the purchase of burial-related items. Eligibility will be authorized after excess resources and any excess income are fully offset by viable bills. Excess resources must be offset by viable bills before such bills are used to offset excess income. Said Directive further provides that whenever a notice is sent to an applicant accepting the applicant with a spenddown requirement or denying an application because of

excess resources, the Agency is required to include a copy of the "Explanation of the Excess Resource Program" along with the Notice.

Pursuant to GIS 15 MA/003, the resource level for SSI-related budgeting of a single individual effective January 1, 2015 is $14,850.00.

Resources are defined in 18 NYCRR 360-4.4(a). It means property of all kinds, including real property and personal property. It includes both tangible and intangible property.

An applicant's/recipient's available resources include:

(1) all resources in the control of the applicant/recipient. It also includes any resources in the control of anyone acting on the applicant's/recipient's behalf such as a guardian, conservator, representative, or committee;

(2) certain resources transferred for less than fair market value as explained in subdivision (c) of section 360-4.4 of 18 NYCRR;

(3) all or part of the equity value of certain income-producing property, as explained in 18 NYCRR 360-4.4(d); and

(4) certain resources of legally responsible relatives, as explained in 18 NYCRR 360-4.3(f); and

(5) certain resources of an MA-qualifying trust, as explained in 18 NYCRR 360-4.5.

For those subject to resource limits, Regulations at 18 NYCRR 360-4.6 and 360-4.7 provide that certain resources be disregarded in determining eligibility for Medical Assistance, including:

- a homestead which is essential and appropriate to the needs of the household.

  According to 18 NYCRR 360-4.7(a)(1), for persons under 21 years of age and persons ineligible for ADC solely because their income and resources are above the eligibility limits, a homestead loses its exempt status if the owner is in a medical facility in permanent absence status and no spouse, child under 21 years of age, certified blind or certified disabled child, or other dependent relative is living in the home.

  For persons who are 65 years of age or older, certified blind or certified disabled, a homestead loses its exempt status if the owner moves out of the home without the intent to return, and no spouse, child under 21 years of age, certified blind or certified disabled child, or other dependent relative is living in the home.

  Note that, for applications for nursing facility services and other long term care services filed on or after January 1, 2006, the homestead exemption is limited to a home in which

the applicant has an equity interest of $750,000 or less. This limitation will not apply, however, in the case of hardship, or if the home is occupied by the applicant's spouse or by the applicant's child who is under age 21, blind or disabled. Social Services Law 366(2)(a). Pursuant to GIS 10 MA/025, effective January 1, 2011 the substantial home equity limit will increase from $750,000 to $758,00.

Department Regulations at 18 NYCRR 360-7.5(a) set forth how the Medical Assistance Program will pay for medical care. Generally the Program will pay for covered services which are necessary in amount, duration and scope to providers who are enrolled in the Medical Assistance program, at the Medical Assistance rate or fee which is in effect at the time the services were provided.

In instances where an erroneous eligibility determination is reversed by a social services district discovering an error, a fair hearing decision or a court order or where the district did not determine eligibility within required time periods, and where the erroneous determination or delay caused the recipient or his/her representative to pay for medically necessary services which would otherwise have been paid for by the Medical Assistance Program, payment may be made directly to the recipient or the recipient's representative. Such payments are not limited to the Medical Assistance rate or fee but may be made to reimburse the recipient or his/her representative for reasonable out-of-pocket expenditures. The provider need not have been enrolled in the Medical Assistance program as long as such provider is legally qualified to provide the services and has not been excluded or otherwise sanctioned from the Medical Assistance Program. An out-of-pocket expenditure will be considered reasonable if it does not exceed 110 percent of the Medical Assistance payment rate for the service. If an out-of-pocket expenditure exceeds 110 percent, the social services district will determine whether the expenditure is reasonable. In making this determination, the district may consider the prevailing private pay rate in the community at the time services were rendered, and any special circumstances demonstrated by the recipient. 18 NYCRR 360-7.5(a).

As stated in GIS 93 MA/024, the adverse court decision in Anna W. v. Bane requires the State to conform to the policy used by the Supplemental Security Income (SSI) program regarding the exemption of the homestead of an SSI-related Medicaid A/R. Under the SSI program, the homestead is not a countable resource as long as the A/R, having left the home, indicates intent to return home (regardless of the individual's actual ability to return home).

Effective October 22, 1993, as long as an SSI-related Medicaid A/R expresses an intent to return home, the social services district must exempt the homestead as a countable resource. A written statement or documentation in the case record by the eligibility worker verifying that the individual stated his or her intent to the worker is sufficient documentation.

If the A/R is unable to state the intent to return home at the time of application, a past statement of intent is sufficient. If the A/R is able to state the intent to return home, a current statement is necessary.

If the A/R is incapable of stating his or her intent, and no past statement of intent exists, the A/R's authorized representative, power of attorney, health care proxy, or guardian may state the A/R's intent to return home. Authorized representative means the individual the applicant designates to represent him or her in the application process. Health care proxy means the individual the applicant legally authorizes to make decisions regarding medical treatment if the applicant becomes temporarily or permanently incapable of communicating his or her own care or treatment wishes.

The A/R's intent to return home must be verified and documented at each recertification, except that the last documented statement of intent will be sufficient in situations where the A/R is no longer capable of stating his or her intent.

Social services districts must not apply the intent to return policy to property that did not meet the definition of a homestead prior to the time the individual left the property. For example, the intent to return policy does not apply if the individual did not consider the property to be his or her primary residence at the time the individual left the property, or the individual never resided in the property.

DISCUSSION

The Appellant's son, who holds Appellant's Power of Attorney, appeared at the hearing with the Appellant's attorney as Representative. The Appellant's Representative waived the Appellant's presence and testimony in this proceeding and stated that the sole issue was the Agency's failure to provide the Appellant with a homestead exemption, which resulted in the Appellant having excess resources.

The Agency withdrew the October 14, 2015 notice at the hearing but asserted that the November 13, 2015 notice denying Medical Assistance is correct because the Appellant's excess resources, including the value of her prior homestead, continue to exceed her viable bills. The Agency's representative stated that the homestead exemption can only apply if the home is the primary residence before the placement at a skilled nursing facility, noting that the Appellant was admitted to a skilled nursing facility after a one year stay in an assisted living facility and not from her home. The Agency's representative stated that therefore the home was not eligible to be considered for a homestead exemption.

It was undisputed that the Appellant was residing in an assisted living facility beginning July 24, 2014 through her admission to the nursing facility, where she continues to reside. The Appellant's son stated that the Appellant was receiving 24 hour care at home prior to entering the assisted living facility. The Appellant's son stated that the assisted living placement was always viewed as a short term solution to Appellant's need for social interaction and that the Appellant always planned to return home. The Appellant's son stated that the Appellant's house has not been rented or sold and that the bills and carrying charges have remained in the Appellant's name and paid for the purpose of maintaining the home for the Appellant's return. The Appellant's son stated that the Appellant never had her mail forwarded to the assisted living

facility and continued to use her home address. The Appellant's son stated that the Appellant continues to ask about her house and her church.

The Appellant's Representative noted that the Medicaid Reference Guide (MRG) at page 337 states that a homestead is exempt as long as it is the primary residence of an SSI-related Applicant/Recipient (AR) or a family member. The homestead remains exempt during a period of temporary absence. When an SSI-related A/R is absent from his/her homestead, the homestead is not a countable resource as long as the A/R indicates an intent to return home (regardless of the individual's actual ability to return home).

The Appellant's Representative also asserted that the determination of whether the homestead exemption applies should be based on factors similar to those utilized to determine district of financial responsibility, including proof of non-abandonment such as Appellant's use of the mailing address, address utilized by Social Security Administration and Internal Revenue Service for Appellant, and continued payment of expenses for the residence. The Representative submitted documentation to support all of these factors.

Finally, the Appellant's Representative stated that, according to the regulations, all that was needed to qualify for the exemption was an intent to return home, whether it was realistic or not. The Representative noted that a statement of Intent to Return home signed by the Appellant's son and power of attorney was included in the Agency's evidence. The Representative submitted Decision After Fair Hearing #5559881P, which cites GIS 93 MA/024 reflecting the adverse court decision in Anna W. v. Bane, which requires the State to conform to the policy used by the Supplemental Security Income (SSI) program regarding the exemption of the homestead of an SSI-related Medicaid A/R. Under the SSI program, the homestead is not a countable resource as long as the A/R, having left the home, indicates intent to return home (regardless of the individual's actual ability to return home).

In order to be considered, the house must have been the primary residence of the Appellant before entering the skilled nursing facility. The regulations allow for a temporary absence and there may be cases in which an absence can no longer be considered temporary. However, in this case, the record demonstrates that the Appellant continued to maintain the home, to maintain her intent to return to the home and to advise the Agency of that intent, and to utilize that address for all purposes, including for Social Security Administration purposes. Therefore, the Agency's determination that the Appellant's available resources include the value of her homestead cannot be upheld.

Inasmuch as the Agency's determination in this case is being reversed, the Agency should comply with this Decision After Fair Hearing pursuant to GIS 13 MA/015 and to not deny the Appellant's application for Medical Assistance based on the reasons set forth in its notice dated November 13, 2015. If there are other remaining eligibility factors that need to be considered, the Agency should continue to process the application and issue a decision as soon as possible.

DECISION AND ORDER

In accordance with the Agency's agreements made at the hearing, the Agency is directed to take the following action if it has not already done so:

1. The Agency is directed to take no action on the October 14, 2015 notice denying Medical Assistance.

The Agency's November 13, 2015 determination to deny the Appellant's application for Medical Assistance for Appellant on the grounds that the Appellant has non-exempt resources which exceed the applicable Medical Assistance resource levels was not correct and is reversed.

1. The Agency is directed to redetermine the Appellant's eligibility by providing a homestead exemption for the Appellant's real property at [redacted].

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is requested, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
12/03/2015

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee