
K.F. v. Atlantic County
Cite as 4 *N.J.A.R.* 237

K.F.,
Petitioner,
v.
ATLANTIC COUNTY
DIVISION OF WELFARE,
Respondent.

Decided June 29, 1982

Initial Decision

SYNOPSIS

Petitioner sought relief from the decision of a local county welfare agency to discontinue reimbursement of round trip transportation expenses for travel from her home to an out-of-state site for recreational and socialization therapy.

The administrative law judge found that petitioner, who was afflicted with cerebral palsy, mental retardation and a chronic throat condition, traveled several times during the week from her home in southern New Jersey to a site in Philadelphia for recreational therapy. She had participated in such activities in 1978 when living in Pennsylvania and continued such participation since moving to New Jersey in 1981; her physician had determined that such activity was medically necessary.

While not disputing the benefits to petitioner, the agency sought to terminate reimbursement because the provider of the services was not a qualified New Jersey Medicaid provider.

The administrative law judge noted that petitioner was indeed receiving medical care at the Philadelphia site since she received medical and psychological therapy in addition to social and recreational therapy. In addition, the agency failed to show that an alternative facility was available within the state or that the Philadelphia provider was not a qualified Medicaid provider.

The judge noted that even if the petitioner had failed to meet the start requirements of the agency's regulations, that this was an appropriate instance for a waiver of those regulations.

Accordingly, the administrative law judge concluded that the denial of reimbursement of travel costs to petitioner had been improper and ordered retroactive and continued reimbursement.

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LAW, ALJ:

Petitioner, by way of her parents, seeks relief from an administrative determination by the Atlantic County Division of Welfare (agency) to discontinue and deny future reimbursement of round trip transportation expenses for travel from Ventnor, New Jersey, to the Ronald Bruce Nipon Association, Inc., Philadelphia, Pennsylvania. The Atlantic County Division of Welfare asserts that it denied petitioner's claim for medical transportation based upon the authority of its Social Services Informational Letter No. 79-3-1, which requires that such transportation services be provided to a qualified medical care provider. The Division of Welfare alleges that the Ronald Bruce Nipon Association is not a qualified medical care provider, pursuant to regulations.

On or about April 29, 1982, petitioner's mother requested a fair hearing, and the matter was transmitted, on May 6, 1982, to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

UNCONTESTED FACTS

1. Petitioner is now a twenty-six year old female residing with her parents in Ventnor, New Jersey.
2. Petitioner is afflicted with cerebral palsy, mental retardation and laryngeal papillomas.
3. The laryngeal papillomas, which are chronic in nature, requires that petitioner submit to surgery for her throat approximately every two months.
4. Petitioner has undergone approximately 57 such surgical procedures.
5. As a result of the affliction, petitioner has undergone a tracheotomy and is required to maintain a trach at all times.
6. Petitioner is the recipient of Supplemental Security Income (SSI) benefits.
7. Petitioner is and has been since 1978, a club member of the Ronald Bruce Nipon Association, Inc., 1100 Oak Lane Avenue, Philadelphia, Pennsylvania.

TESTIMONIAL EVIDENCE

The Division of Welfare's Supervisor of Social Services testified that in October 1981, the Division became aware that petitioner was in need of transportation to the Children's Hospital, Philadelphia, Penn-

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sylvania, for the purpose of throat surgery. The Division was also advised by petitioner's parents that petitioner would be in need of transportation to the Ronald Bruce Nipon Association, Inc., Philadelphia, for recreational and socialization therapy. The Division was informed that the recreational and socialization therapy was a part of petitioner's treatment program. Because of the unusual nature of petitioner's treatment and therapy and its applicability for transportation reimbursement, the Division requested that petitioner supply it with statements from her physicians that the treatment was necessary. Such physician's statements were received by the Division and thereupon the Division reimbursed petitioner's transportation for the period of October 1981 through March 1982 in the amount of \$545, to the Ronald Bruce Nipon Association, Inc. The Division also reimbursed petitioner's transportation expenses for two trips to Children's Hospital, Philadelphia, in the amount of \$64.19.

The Division does not dispute that the recreational and socialization therapy is beneficial to petitioner. However, after reviewing, in March 1982, the Social Services Informational Transmittal Letter no. 79-3-1, dated March 5, 1979, and petitioner's particular case, the Supervisor testified that he specifically referred to paragraph no. 3, of the *Medical Transportation Guidelines-Medicaid Eligibles*, which provides that:

Reimbursement for transportation services is allowable only when provided to or from a medical destination point, which is defined as the point to which a client goes to *receive medical care from a qualified medical care provider.* (Emphasis supplied)

Upon checking with the New Jersey Division of Medical Assistance and the Prudential Life Insurance Company, the Medicaid carrier, it was determined by the Division that the Ronald Bruce Nipon Association, Inc. was not a qualified New Jersey Medicaid provider. Based upon this information, the Division discontinued petitioner's transportation reimbursement to the Ronald Bruce Nipon Association while continuing such reimbursement for her transportation to the Children's Hospital in Philadelphia.

On cross-examination, the Supervisor stated that Medicaid provided for psychological treatment. He stated further, that there were qualified psychologists available to petitioner in the Atlantic City area.

Petitioner's father testified and asserted among other things, that petitioner was afforded medical and psychological counselling services by the Ronald Bruce Nipon Association, Inc., in addition to rec-

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reational and socialization services and therapy. He stated that he and his family moved to New Jersey from Pennsylvania in September 1981. Prior to their move, and while residents of Pennsylvania, petitioner had been a "club member" in the Ronald Bruce Nipon Association, Inc., since 1978. Petitioner's father explained that the Association used the designation "club member" rather than client, patient or other terminology which would connote illness or abnormality in the individuals it serves. He asserted that the Association was funded, in part, through the Federal Government and the Commonwealth of Pennsylvania. He stated that the Association only provided services to Pennsylvania residents; however, inasmuch as petitioner was a member of the Association prior to her move to New Jersey, petitioner was allowed and permitted to continue her membership in the Association subsequent to her move.

Petitioner's father testified that a similar challenge, with regard to transportation reimbursement to the Association, occurred while petitioner was a resident of Pennsylvania. He introduced into evidence an "Order and Adjudication" issued by the Commonwealth of Pennsylvania, Department of Public Welfare, and specifically referred to the hearing examiner's *Findings of Fact*, set forth as follows:

1. Appellants' daughter, Karen, 23 years of age, is an SSI recipient.
2. Karen suffers from cerebral palsy, retardation, pappalomos [*sic*] of the throat, and must wear a trach in order to breathe. Her voice is very weak. Karen has been hospitalized 38 times in the last four years for operations on her throat. She must have this surgery every two to two and one-half months. During surgery and after, she has recently begun experiencing seizures. There is no known cure for this condition. Furthermore, appellant is unable to read or write.
3. Karen attends the Ronald Bruce Nipon Association, Inc., 314 N. Broad Street. Each month she receives a calendar of events and activities. A professional staff works with her and provides various activities. She attends Saturday and Sunday, and other days on which there are special events.
4. Appellant's physician, Dr. John Tucker, of Hahnemann Hospital, has advised that Karen should continue with the program since it is the part of her life to which she most looks forward, as it brings up her spirits which is necessary for the frequent number of operations which she undergoes. The alternative is depression prior to the operations which would not be in her best interest given her physical and mental condition.

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5. Transportation cannot be provided by anyone else, as the appellants */sic/* are familiar with treating Karen with her trach. If she had an accident with the trach while travelling with someone who could not administer first aid, she would die within minutes.
6. The county had been reimbursing appellant's expenses to and from the association until December 1979.
7. On December 4, 1979, the county worker sent a letter to the appellant stating that effective December 1979, the Department would no longer honor any transportation fees to the Association. The letter was based on a TWX message of October 5, 1979 from Mr. Don Jose Stovall. An appeal was taken and received in the CAO on December 12, 1979.

Petitioner's father stated that the appeal for transportation reimbursement was upheld by way of an Order, recited hereinbelow:

It is hereby **ORDERED** and **DECREED** that the appeal of the appellants is sustained. The Philadelphia County Board of Assistance is directed to issue a one-time grant in accordance with the regulations cited in the Adjudication in the appropriate amount retroactive to December 1979, and continuing so long as the appellant remains eligible.

The appellants are hereby advised that in the event they take issue with this Adjudication and Order, they may take an appeal therefrom to the Commonwealth Court of Pennsylvania within thirty days from the date of this Order.

Petitioner's father contends that public transportation for petitioner from Ventnor to Philadelphia is totally unacceptable because of petitioner's medical and physical condition and specifically cited paragraph three of the hearing examiners, Findings of Fact. He asserted that he and/or his wife had had the experience, on several occasions, of administering emergency first aid to petitioner when she had an obstruction in the trach which resulted in the loss of breath and loss of consciousness. Under such a potential threat to petitioner's life, her parents respectfully refuse to accept the Division's recommendation that petitioner use public transportation to and from the Association.

Petitioner's mother testified and corroborated much of her husband's testimony. She stated that she transports petitioner to and from the Association one day per week, usually on a Sunday. Petitioner's mother testified that she is employed during the week and, therefore, cannot take time off from her job for petitioner to take advantage of the Association's weekday programs and activities.

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Both parents testified that they had attempted to involve petitioner in other local activities. They had made contact with the Atlantic County Office of Disabled Persons Services to engage petitioner in a sheltered workshop program, in which petitioner participates. Another program, referred to as the Bud Cox Theater Group, was tried by petitioner; however, because of petitioner's physical condition she could not participate in the singing and dancing, the major activity of the program.

FINDINGS OF FACT

Having carefully reviewed and considered all of the testimony and other evidence offered in this matter, and having given fair weight thereto and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** that:

1. Those Uncontested Facts set forth hereinbefore are hereby adopted, by reference, as **FINDINGS OF FACT**.
2. On or about September 1981, petitioner and her family moved from Philadelphia, Pennsylvania to Ventnor, New Jersey.
3. In October 1981, petitioner made an appropriate application for, and was granted, transportation reimbursement to and from Children's Hospital, Philadelphia, Pennsylvania.
4. In October 1981, petitioner also made application for transportation reimbursement to and from the Ronald Bruce Nipon Association, Inc., Philadelphia, Pennsylvania.
5. The Division, upon receipt of petitioner's physician's statements found petitioner to be Medicaid eligible under Title XIX of the Social Security Act and reimbursed her transportation to and from the Ronald Bruce Nipon Association, Inc., for the period of October 1981 through and including March 1982.
6. On or about April 1982, the Division terminated petitioner's transportation reimbursement to the Ronald Bruce Nipon Association, Inc.
7. Petitioner's mother transports petitioner to and from the Ronald Bruce Nipon Association one day per week.
8. The Ronald Bruce Nipon Association, Inc., accepts club members only from the Commonwealth of Pennsylvania.
9. Subsequent to petitioner's move from Pennsylvania to New Jersey, the Association made an exception and continued petitioner's membership.
10. On or about February 13, 1980, the Department of Public

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Welfare, Commonwealth of Pennsylvania adjudged and ordered petitioner Medicaid eligible for transportation reimbursement costs to and from the Ronald Bruce Nipon Association, Inc., retroactive to December 1979 and to continue so long as petitioner remained eligible.

11. The Ronald Bruce Nipon Association, Inc., is funded, in part, through funds of the Commonwealth of Pennsylvania and the Federal government.
12. Due to petitioner's unique physical condition and the high potential of risk to her life, public transportation is neither a practical means of conveyance nor a viable alternative to private transportation.

DISCUSSION

The agency grounds its denial to provide petitioner transportation reimbursement in part, upon a section of its Medical Transportation Guidelines-Medicaid Eligibles which is repeated herein as follows:

Reimbursement for transportation services is allowable only when provided to or from a medical destination point, which is defined as the point to which a client goes to receive medical care from a qualified medical care provider.

At issue in this matter is whether petitioner is in receipt of medical care or treatment. The Supreme Court of this State in *Kahn v. Metropolitan Life Ins. Co.*, 132 *N.J.L.* 503, 505 (Sup. Ct. 1945) has said that:

The word 'medical' means 'of, pertaining to, or dealing with, the healing act, or the science of medicine, especially in the narrower sense; as medical profession; *medical services*; medical jurisprudence; . . .' (Emphasis supplied.)

The Court also said in *Phahler v. Eclipse Pioneer Div. of Bendix Aviation Corp.*, 21 *N.J.* 486, 491 (1956) that:

'Treatment' is a broad term covering all steps taken to effect a cure of the injury or disease. It includes examination and diagnosis as well as application of remedies (citations omitted).

The record in this matter demonstrates that petitioner is afflicted with cerebral palsy coupled with a unique form of chronic laryngeal papillomas which require that a surgical procedure be performed on petitioner every two months. Petitioner's condition is further com-

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plicated by the fact that she has undergone a tracheotomy which requires the maintenance of a trach at all times. It has thus been shown that petitioner is in need of continued medical services for her physical disabilities.

The undisputed evidence also demonstrates that petitioner's participation in and with the Ronald Bruce Nipon Association, Inc., includes medical and psychological counselling therapy and treatment in addition to social and recreational therapy. Petitioner's physician, Dr. John Rucker, advised her continued participation with the Association as "necessary" to petitioner's well being as a result of the frequent number of surgical procedures she is required to undergo. The uncontroverted testimony of both petitioner's parents that there exists no comparable or alternative program to serve petitioner's unique needs is also persuasive.

The Division has failed to show that such an alternative or comparable activity is available to petitioner in the State of New Jersey. The Division has further failed to show that the Association, a qualified medical provider pursuant to the Commonwealth of Pennsylvania, is not, in fact, a qualified medical provider pursuant to Title XIX. The absence of such proofs, in view of the fact that the Association is recognized by our sister state, precludes the agency from denying petitioner's reimbursement for transportation costs, pursuant to its own regulations.

In addition, assuming, *arguendo*, that petitioner does not meet the strict requirements of the agency regulations, the Appellate Division of the Superior Court has determined that this State agency has discretionary authority to waive regulations for special reasons and good cause, leading this court to conclude that it is authorized to grant petitioner's requested transportation reimbursement under Title XIX. The court said in *Dougherty v. Human Services Dept., Etc.*, 179 N.J. Super. 541, 547-548 (App. Div. 1981), that:

We find nothing in the federal legislation or regulations which purports to deprive state agencies of the ordinarily reserved right of reasonable exercise of discretion. In this respect it must be kept in mind that we are not here dealing with an organic change of legislation or waiver of such a nature as must be authorized by legislation. Rather, we deal with the question of whether the very director to whom has been delegated specific authority to promulgate the regulations can by the same token waive them for special reasons and for good cause. We emphasize that caution is needed in the relaxation of an administrative regulation

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in order to avoid undesirable favoritism or prejudice or the appearance thereof. *Nevertheless, if clear and compelling reasons are present, waiver or relaxation of a regulation should be permissible to avoid a result which obviously does not achieve the purpose of the legislation.* (Emphasis supplied.)

Thus, in the absence of an alternative program to meet petitioner's needs, compelling reasons are present to grant her request.

CONCLUSIONS

Based upon the facts adduced at hearing, I **CONCLUDE** that petitioner is eligible for transportation reimbursement costs to and from the Ronald Bruce Nipon Association, Inc. This conclusion is grounded upon the uncontroverted evidence that the Commonwealth of Pennsylvania recognizes the Association as a provider of necessary treatment to petitioner. Petitioner's plan of treatment was prescribed by her physician, thus comporting with the conditions set forth in the Medical Transportation Guidelines-Medicaid Eligibles, upon which the Division relies. Notwithstanding that the Association is not included on a list of eligible providers for the State of New Jersey, the facts in this matter clearly demonstrates that while the Association only provides services to residents of Pennsylvania, it made an exception with regard to petitioner when she changed her residence and domicile from Pennsylvania to New Jersey.

Accordingly, I **CONCLUDE** that the agency's denial of transportation reimbursement costs to petitioner was in error and is hereby **REVERSED**.

ORDER

Based upon the facts and conclusions herein, it is hereby **ORDERED** that the Atlantic County Division of Welfare reimburse petitioner for her transportation costs from Ventnor, New Jersey, to the Ronald Bruce Nipon Association, Inc., Philadelphia, Pennsylvania, and return to Ventnor, New Jersey, retroactive to and including April 1982 and continuing during all such periods petitioner is eligible.

Petitioner has sustained her burden of proof by a preponderance of the credible evidence and, accordingly, judgment is hereby entered in her behalf.

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**After reviewing this Initial Decision the
Department of Human Services on August 11, 1982
issued the following Final Decision:**

The initial decision issued by the Office of Administrative Law, reversing the agency's action denying medical transportation reimbursement to petitioner and ordering the Atlantic County Division of Welfare to reimburse petitioner for transportation costs retroactive to and including April 1982 and continuing such payments during all such periods in which petitioner is eligible, *IS MODIFIED*. This final decision sustains that part of the administrative law judge's decision which approves retroactive medical transportation payments to and including April 1982, but modifies the open-ended direction to continue such payments during all such periods in which petitioner is eligible.

The focal point of this case, which concerns the issue of eligibility for medical transportation reimbursement, is whether petitioner's medical care provider (Ronald Bruce Nipon, Association, Inc.) is a qualified New Jersey Medical Care provider according to the New Jersey Medical Program. The administrative law judge, in his initial decision, found petitioner eligible for transportation reimbursement based upon the recognition given by the Commonwealth of Pennsylvania to the Ronald Bruce Nipon Association as a provider of necessary treatment to petitioner. Regarding the fact that the Ronald Bruce Nipon Association is not included on a list of eligible Medicaid providers for the State of New Jersey, the administrative law judge put the burden of establishing the ineligibility of the association under Title XIX on the agency and found the absence of the Association from a New Jersey eligible list insufficient to establish the Association's ineligibility since it was recognized as a Title XIX-eligible provider in Pennsylvania. Further, the administrative law judge indicated by his decision that since the Association only provides services to residents of Pennsylvania (and was providing services to petitioner as an exception) there would be no reason for said Association to be certified on a list of eligible Medicaid providers for the State of New Jersey.

As an additional basis for this holding, the administrative law judge stated that a state agency has discretionary authority to waive regulations for special reasons and good cause, citing *Dougherty v. Human Services Department*, a 1981 New Jersey Appellate Division case. By citing this case, the administrative law judge obviously intended to

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indicate that the agency *should have* waived the qualified medical care provider requirement. However, the administrative law judge did not pursue the rationale inherent in his citing of the case, i.e., that the agency's failure to waive the requirement in the face of Appellate Division authority giving them this power was an arbitrary and capricious failure to exercise such discretion. If the administrative law judge wanted to state that the agency's failure to waive the regulation, given its power to waive the regulation, was an arbitrary and capricious abuse of discretion, this should have been clearly indicated in the initial decision. *Black's Law Dictionary*, 5th Edition, defines "Arbitrary and capricious" as follows:

Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle. *Eldwood Investors Co. v. Behme*, 79 Misc. 2d 910, 361 *N.Y.S.* 2d 488, 492.

Given the failure of the agency to propose any "comparable or alternative program to serve petitioner's unique needs, this final decision finds that the respondent agency's action was arbitrary and capricious, and that the qualified medical care provider requirement should have been waived by the agency in this case. This decision will not comment on the appropriateness of the administrative law judge's placing the burden of establishing a medical care provider's ineligibility on respondent agency, or the administrative law judge's finding that the Ronald Bruce Nipon Association was an eligible New Jersey medical care provider based on Pennsylvania's designation of the Association as an approved Title XIX (Medicaid) provider in that state. These issues should more appropriately be addressed by the Division of Medical Assistance and Health Services within the context of a wholly Medicaid case.

Since the respondent agency failure to produce a medical program comparable to the Ronald Bruce Nipon Association from which petitioner has been receiving services, this final decision directs that petitioner's medical transportation shall continue to be funded for the immediate future. However, respondent agency is directed to investigate other appropriate approved New Jersey programs and services for petitioner, and to present the names of those programs, if any, to the Director of the Division of Youth and Family Services for approval. If an alternative program is subsequently identified and approved by the DYFS Director, petitioner will no longer be eligible for medical transportation to the Ronald Bruce Nipon Association.