



**Cona Elder Law Sets Legal Precedent, Ensures the Right to a  
Fair Hearing and Secures Balances Due**

A Suffolk County Skilled Nursing Facility (SNF) required the assistance of Cona Elder Law to resolve issues concerning an incapacitated resident's need to remit his sizeable Net Available Monthly Income (NAMI) as calculated by the agency, which were complicated by the resident's daughter and power of attorney (POA) who had access to and was converting his income on an ongoing basis.

Upon the referral of this matter to Cona Elder Law, we immediately petitioned the Court to appoint a Guardian for the resident, and submitted a recertification application with a request for a zero NAMI budget in light of the pending Article 81 proceeding.

Over the course of several months, DSS failed to issue a determination regarding the resident's Recertification Application. During that same time period, the resident passed away.

Even though DSS continued to request documentation in furtherance of its review of the Recertification Application, DSS failed to issue a Notice of Decision. Instead, continuing a concerning pattern by DSS that Cona Elder Law has repeatedly brought to the attention of the Office of Medicaid Management, DSS issued an "informational letter" or MA-229 notice – which does not confer Fair Hearing appeal rights – to convey its decision that there would be no revision to the resident's chronic care budget, and that no further review would be undertaken due to the death of the resident. This resulted in a significant outstanding balance to the SNF for the care it provided to the resident.

Cona Elder Law escalated the case to a Fair Hearing, and presented arguments before the Administrative Law Judge as to DSS' inaction and their shameful and repeated use of "informational notices" when rendering determinations regarding incapacitated applicants pending guardianship, who lack the ability to timely address same and are simultaneously deprived of their due process rights. In response to these arguments, the New York State Department of Health issued a strongly worded decision which criticized DSS' actions, directed DSS to recalculate the resident's NAMI retroactively to treat the resident's pension income as unavailable throughout the

entire period of the pendency of the guardianship, and directed DSS to ascertain and determine if any portion of the resident's income was not being received during any period covered in the guardianship petition, and to exclude this income from the resident's NAMI retroactively during any period it was not received by the resident.

In a stern rebuke of DSS' treatment of this resident's Medicaid application and its practice of issuing MA-229 "informational notices" to Medicaid applicants, the New York State Department of Health chastised DSS, stating that "the Agency's position blatantly disregards the Agency's obligations under the Regulations," and further reminded DSS that "it may not circumvent its duty to issue appropriate notice of determinations regarding eligibility and budgeting by issuing information forms which do not provide an opportunity for Fair Hearing."

This significant Decision After Fair Hearing will not only remedy the financial loss suffered by the SNF which provided care for this resident for which it was not adequately paid by the Medicaid program, but it will have a substantial impact as legal precedent, dissuading and deterring DSS from utilizing these improper "informational notices" ever again, ending an abusive practice that hurt Medicaid recipients and health care facilities alike.

**Cona Elder Law Attorney:** This case was successfully handled by Partner, Diana Choy-Shan, Esq., Senior Associate, Dana Walsh Sivak, Esq. and Senior Associate, Kyle Stefurak, Esq.

*Cona Elder Law is an award-winning health care law firm with a superior reputation representing health care systems, health care facilities, Assisted Living Facilities and Continuing Care Retirement Communities in New York, New Jersey and Pennsylvania.*

*As an Elder Law firm, Cona Elder Law offers expertise in government benefits, Medicaid, Medicare, Fair Hearings, Article 78 proceedings and Guardianships, in addition to collections and litigation. We keep open all possible sources of payment, whether private payment through litigation or by securing Medicaid benefits on behalf of a resident. With our unsurpassed success rate, Cona Elder Law is more efficient and more effective than other law firms. Contact us at [631.390.5000](tel:631.390.5000) or visit [www.conaelderlaw.com](http://www.conaelderlaw.com).*

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