EXHIBIT N

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

GABRIELLE GOODWIN
LAUCHLIN WALDOCH, ESQ.
1709 HERMITAGE BL
STE 102
TALLAHASSEE, FL 32308

PETITIONER,

Vs.

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES
CIRCUIT: 02 Leon
UNIT: 88510

RESPONDENT.
_____/

APPEAL NO. 12F-02923

CASE NO. 1362242021

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on July 24, 2012.

APPEARANCES

For the Petitioner: Lauchlin Waldoch, Esq.
Ann Westall, Public Benefit Manager

For the Respondent: Paul Rowell, Esq. Regional Legal Counsel
Nartasha Peacock, Supervisor
Carrie Sheffield, Management Review Specialist
Medicaid Program Office

Observer: Melissa Roedel, hearing officer

STATEMENT OF ISSUE

Petitioner is appealing the Department's action of March 19, 2012 which did not address using unmet medical expenses (UME) for services prior to eligibility to reduce the patient responsibility.

PRELIMINARY STATEMENT

Prior hearing dates were scheduled for May 8, 2012 and July 11, 2012. Continuances were granted and the hearing was then set for July 24, 2012. The hearing record was held open through July 27, 2012 for the respondent and through July 31, 2012 for petitioner to file any rebuttals, if needed.

FINDINGS OF FACT

The parties submitted a Joint Stipulation of Summary of Facts Supported by Documents to be included in Evidence; the stipulated facts are cited below in paragraphs one through five:

1. Petitioner is a resident of Heritage Health Care, a skilled nursing facility (the facility) in Tallahassee, Florida; she was admitted in November 2010.

2. The facility applied several times for long term care Medicaid under Florida's Institutional Care Program (ICP) beginning in March 2011; these requests were denied for various reasons.

3. An application for ICP was filed online on January 18, 2012, seeking retroactive coverage effective December 2011. The application also indicated that there were pre-eligibility unmet medical expenses (UME).

4. The Department approved the application and issued notice on March 19, 2012. Benefits were approved retroactive to December 2011.

5. The issue of UME was not addressed in the approval notice. Petitioner's representative sent an email on March 20, 2012 requesting that a nursing home bill for services prior to eligibility be used as a UME in order to reduce the patient responsibility. A copy of the outstanding charges was attached. The Department responded stating, "As you are aware we are not able to do this - our policy on this has not changed."

6. Respondent's Exhibit 2 includes a copy of Florida's State Plan under Title XIX of the Social Security Act, Supplement 3 to Attachment 2.6-A and was approved February 23, 2004. The Supplement 3 is "Post-Eligibility Treatment of Institutionalized Individuals' Incomes" and states, "The following reasonable limits will be placed on other incurred medical expense deductions for residents of medical institutions in the post-eligibility treatment of income: ... 3. Services and items covered and paid for under the Medicaid State Plan will not be allowed as deductions. 4. Services and items covered by and paid for under the Medicaid nursing or other facility per diem will not be allowed as a medical expense deduction."

CONCLUSIONS OF LAW

7. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Fla. Stat § 409.285. This order is the final administrative decision of the Department of Children and Families under § 409.285, Fla. Stat.

8. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

9. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof was assigned to the petitioner.

10. Title 42 Section 435.725 C.F.R. states in pertinent part, the following:

> 435.725 Post-eligibility treatment of income of institutionalized individuals in SSI States: Application of patient income to the cost of care.
> (a) Basic rules. (1) The agency must reduce its payment to an institution, for services provided to an individual specified in paragraph (b) of this section, by the amount that remains after deducting the amounts specified in paragraphs (c) and (d) of this section, from the individual's total income,
> ...
> (c) Required deductions. In reducing its payment to the institution, the agency must deduct the following amounts, in the following order, from the individual's total income, as determined under paragraph (e) of this section. Income that was disregarded in determining eligibility must be considered in this process...(4) Expenses not subject to third party payment. Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including—
> (i) Medicare and other health insurance premiums, deductibles, or coinsurance charges; and
> (ii) Necessary medical or remedial care recognized under State law but not covered under the State's Medicaid plan, subject to reasonable limits the agency may establish on amounts of expenses.

11. In accordance with 42 C.F.R. 435.725, Florida Administrative Code 65A-1.7141 pertaining to SSI-Related Medicaid Post Eligibility Treatment of Income was promulgated and states in relevant part:

> (1)(g) Effective January 1, 2004, the department allows a deduction for the actual amount of health insurance premiums, deductibles, coinsurance charges and medical expenses, not subject to payment by a third party, incurred by a Medicaid recipient for programs involving post eligibility calculation of a patient responsibility, **as authorized by the Medicaid State Plan and in accordance with 42 CFR 435.725** (emphasis added).
> 1. The medical/remedial care service or item must meet all the following criteria:

a. Be recognized under state law;
b. Be medically necessary;
c. Not be a Medicaid compensable expense; and
d. Not be covered by the facility or provider per diem.

2. For services or items not covered by the Medicaid State Plan, the amount of the deduction will be the actual amount for services or items incurred not to exceed the highest of a payment or fee recognized by Medicare, commercial payers, or any other contractually liable third party payer for the same or similar service or item.

3. Expenses for services or items received prior to the first month of Medicaid eligibility can only be used in the initial projection of medical expenses if the service or item was provided during the three month period prior to the month of application **and it is anticipated that the expense for the service or item will recur in the initial projection period.** (emphasis added)

4. For the initial projection period, the department will allow a deduction for the anticipated amount of uncovered medical expenses incurred during the three month period prior to the date of application, **and that are recurring (reasonably anticipated to occur)** expenses in the initial projection period... (emphasis added)

12. Petitioner argues that Florida is in violation of federal law as §1902(a)(1)(A) of the Act, 42 U.S.C. §1396(a)(1)(A)(iii), requires that states allow a reduction in patient responsibility to account for "necessary and remedial care recognized under State law but not covered under the State plan under this subchapter, subject to reasonable limits *the State may* establish on the amount of these expenses." Petitioner believes the State plan would have been the mechanism through which the State could place reasonable limits on the amount of expenses it deducted from the patient responsibility amount.

13. Respondent argues that the law allows for reasonable limits to be set by each state on the amount of expenses to be deducted form the ICP patient responsibility. Florida devised a state plan which was approved by Centers for Medicare and Medicaid

Services (CMS) which excludes payments for those services paid for by Medicaid. Respondent argues that the Department applies a liberal interpretation of the federal statute and the federal regulation which states "there should be taken into account amounts for incurred expenses for medical or remedial care recognized under State law but not covered under the State Plan." In creating and obtaining approval of its state plan, Florida is in compliance with Federal and State law and is no more restrictive than the statute and regulations permit.

14. The federal and state authorities specifically state that deductions may be used for health insurance payments, premiums, deductibles and coinsurance charges. The undersigned concludes that when the patient responsibility amount is reduced by the amount of an insurance premium the ICP eligible individual makes, the purpose is to allow that individual to have enough income to make that payment that is recurring, thereby typically reducing the amount of money Medicaid pays for the individual's medical expenses. There is no language in the federal or state authorities that allow counting the past bill that is *not recurring* as a medical expense for the ongoing patient responsiblity. The undersigned concludes that if the ongoing patient responsibilty was reduced due to nursing home expenses prior to becoming ICP eligible, Medicaid would be paying a larger share of the ongoing care in the facility due to a past period of time when petitioner was not eligible for ICP Medicaid. The undersigned concludes that the Department appropriately excluded expenses for nursing facility services rendered prior to Medicaid eligibility as an uncovered medical expense deduction in the calculation of patient responsibility; these past bills are not recurring bills and are not allowed in the

rules. The undersigned concludes that the Department correctly excluded petitioner's nursing home expenses prior to becoming Medicaid eligible, in the ongoing ICP patient responsibility determination, based on the limits Florida chose and the Federal CMS agency approved. The limits to incurred medical expense deductions recognized in post-eligibility treatment of institutionalized individuals' incomes include services and items paid for under the Medicaid State Plan and Services and items covered by and paid for under the Medicaid nursing or other facility per diem. In addition, the Florida Administrative Code clarifies that the expense used as a deduction to the patient responsibility cannot be a Medicaid compensable expense. Nursing home room and board charges are Medicaid compensable expenses.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is denied.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 16th day of August, 2012,

in Tallahassee, Florida.

Susan Dixon
Hearing Officer
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