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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1421-21**

N.B.,

Petitioner-Appellant,

v.

**DIVISION OF MEDICAL
ASSISTANCE AND HEALTH
SERVICES,**

Respondent-Respondent,

and

**UNION COUNTY BOARD
OF SOCIAL SERVICES,**

Respondent.

Argued May 31, 2023 – Decided August 14, 2023

Before Judges Rose and Messano.

On appeal from the New Jersey Department of Human Services, Division of Medical Assistance and Health Services.

Adrienne J. Burke argued the cause for appellant (Macri & Associates, LLC, attorneys; Adrienne J. Burke, of counsel and on the briefs).

Michael Sarno, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Melissa Raksa, Assistant Attorney General, of counsel; Kathleen E. Horton, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner N.B. (Nick), through his son and attorney-in-fact P.B. (Phil), appeals from the December 9, 2021 final agency decision of the Division of Medical Assistance and Health Services (the Division) finding Nick eligible for Medicaid benefits but imposing a 782-day penalty period because Nick transferred his home and other monetary assets to his son for less than fair-market value during the five-year "look-back" period established by N.J.A.C. 10:71-4.10(a).¹ In reversing the initial decision filed by the administrative law judge (ALJ), the Division's Assistant Commissioner concluded that Nick had transferred \$279,627.96 in assets "in order to establish Medicaid eligibility."

The record discloses that on October 1, 2020, Phil submitted a Medicaid application on his father's behalf to the Union County Board of Social Services, the

¹ We identify petitioner and his family members by initials or pseudonyms to maintain the confidentiality of Nick's medical records. R. 1:38-3(a)(2).

county welfare agency (CWA) responsible for reviewing such applications. Sometime within the prior month, Nick had moved out of his home in Roselle Park, which he had shared with Phil and Phil's wife, C.B. (Carol), since 2014, and was admitted to Cranford Rehabilitation and Nursing Center as a private pay resident. Approximately one year earlier, on August 22, 2019, Nick had transferred his home to Phil for \$1 and retained a life estate in the property.

The CWA approved Nick for Medicaid benefits as of October 1, 2020, but imposed a \$379,203.22 asset transfer penalty making Nick ineligible for Medicaid long-term care benefits from October 1, 2020, through August 8, 2023. The penalty was based on: 1) \$330,752, the fair market value of Nick's home at the time it was transferred to Phil; 2) the outstanding unpaid balance of \$34,451.22 Nick had purportedly "loaned" to his son; and 3) a \$14,000 withdrawal from Nick's bank account on September 14, 2020, which the CWA concluded was an ineligible transfer. Nick requested a fair hearing to dispute the transfer penalty, and the Division transmitted the matter to the Office of Administrative Law (OAL) as a contested case.

The ALJ heard the testimony of Phil and Carol, Dr. Betty Lim, a geriatric specialist who provided medical care to Nick from August 2017 through January

2018, and Evelyn Stone, Nick's live-in caregiver from June 2016 to February 2019. The judge found the testimony of all the witnesses credible.

Dr. Lim diagnosed Nick with progressive Dementia Syndrome that was likely attributed to underlying Alzheimer's Dementia and alcohol-related cognitive decline, Korsakoff Syndrome. In her view, Nick was incapable of residing in his home independently and required "special attention and care involving supervision of his activities of daily living [(ADLs)]" and "assistance with all instrumental [ADLs]" to ensure "adequate nutrition and supervision for his safety."

Dr. Lim testified that Nick scored eleven out of thirty on the Montreal Cognitive Assessment Test,² which evidenced a "degree of impairment . . . you often see in nursing home patients." She explained that in her opinion, Nick had likely lived with Alzheimer's disease for seven-to-ten years, and, as a chronic alcohol user, which accelerates dementia, he could "not live alone safely." Dr. Lim concluded that Phil and Carol had provided Nick with the necessary level of care during the preceding years.

The ALJ found Phil and Carol's testimony regarding Nick's declining condition and the care he required was supported by Stone's testimony. Stone

² The Montreal Cognitive Assessment is a test used by healthcare providers to evaluate people with memory loss or other symptoms of cognitive decline. <http://mocacognition.com>.

testified that Nick was prone to falls, often unable to get out of bed in the morning, needed constant reminders to take his medication, and unable to cook meals for himself.

The ALJ also considered certifications filed by Ellen Pariso, who provided additional in-home services to Nick during the relevant time; Sophie Goncalves, the owner of a cleaning service that regularly cleaned the Roselle home; and Dr. Robert B. Solomon, Nick's treating physician. Pariso explained that Nick would forget where the bathroom was and resort to urinating in a cup, which he would often drop on the floor. Copies of checks written by Carol were provided to document payments to Pariso.

Goncalves confirmed Nick's urination mishaps occurred frequently, requiring bi-weekly cleanings of the house due to a strong "urine stench." She provided a spreadsheet documenting the dates of services she provided, the amount paid, and the method of payment.

Dr. Solomon's August 2019 certification opined that Nick suffered from Alzheimer's disease, was unable to perform certain ADLs, could not reside at home independently, and the services provided by Phil during the prior two years allowed Nick to remain in his home and not be institutionalized.

The ALJ issued an initial decision reversing the transfer penalty. He first determined that the child caregiver exemption, N.J.A.C. 10:71-4.10(d)(4), applied to Nick's transfer of his Roselle house to Phil. In making that determination, the ALJ credited the evidence that Phil had provided nursing-home-level care to Nick for two years prior to his institutionalization, which allowed Nick to remain in his home.

The ALJ also addressed the other portions of the CWA's transfer penalty decision. He first noted that of the \$51,077.33 Nick had loaned Phil between August 2015 and August 2019, it was undisputed that Phil had paid back \$16,625.11, documented by PayPal deposits into Nick's account. The ALJ then considered the evidence that Phil had not only paid back the balance of \$34,452.22 through in-kind services, but also had overpaid approximately \$14,000 to his father. The September 14, 2020 withdrawal from Nick's account was justified pursuant to N.J.A.C. 10:71-4.10(b)(6)(ii).

Citing the testimony and certifications, the ALJ determined Phil and Carol paid for the following services for Nick's benefit and these amounts were justifiable setoffs against the loan balance: \$12,500 for house cleaning services from June 2017 to August 2020; \$21,000 for siding and a new roof in August 2018; \$5,150 to replace the driveway on June 12, 2020; and \$10,000 for in-home caregiver services from

May 2018 to February 2020. The ALJ also found credible Phil's testimony that his father agreed to this arrangement in lieu of cash repayments and later withdrew \$14,000 from his bank account to reimburse Phil for payments he made on his father's behalf in excess of the loan amount. The ALJ's initial decision, therefore, recommended that the entire transfer penalty imposed by the CWA, disqualifying Nick for Medicaid Long Term Care benefits from October 1, 2020, through August 8, 2023, be reversed.

The Assistant Commissioner's December 23, 2021 final agency decision reversed "the ALJ's recommended decision as it relates to all three transfers at issue." She determined Nick had not overcome the presumption that the conveyance of his home to Phil for below market value during the five years prior to Nick's institutionalization was subject to a transfer penalty because the evidence failed to support a finding that Nick needed "a nursing home level of care" during the two years prior to his institutionalization.

The Assistant Commissioner highlighted contradictions or embellishments between Pariso's first and second certifications and between Goncalves' two certifications. Noting the inability to have cross-examined both women, the Assistant Commissioner concluded the "certifications should not have been considered in making a determination in this matter." She reached the same

conclusion regarding Dr. Solomon's certification, which the Assistant Commissioner recognized was a form the doctor completed by filling in certain blank spaces. She noted the certification lacked details and was unsupported by documentation and contemporaneous notes.

Turning her attention to Dr. Lim, the Assistant Commissioner cited none of the doctor's testimony before the ALJ, but rather focused her attention on notes the doctor wrote during the period she treated Nick. She concluded those notes "provide that as of January 2018, [Nick] did not need assistance with his [ADLs] . . . and [Dr. Lim] did not examine [Nick] within the relevant time period, i.e., September/October 2018 through September/October 2020." The Assistant Commissioner asserted "it cannot be determined that [Nick] needed nursing home level of care for the two-year period immediately preceding [Nick's] institutionalization based on Dr. Lim's contemporaneous assessments."

As to Stone, the Assistant Commissioner characterized her testimony as only demonstrating that Nick "needed normal support services and supervision." She highlighted opinions in Stone's certifications that made "medical determinations . . . without basis" and focused on Nick's alcohol usage. The Assistant Commissioner

noted that Stone had not cared for Nick during the entire two-year period before his institutionalization.³

Further, the Assistant Commissioner was not convinced Phil and Carol provided, or paid, for Nick's in-home care, citing Dr. Lim's notes indicating Nick had been left alone on a date when Stone said she was providing in-home care and further noted that Phil and Carol could not provide "24-7" care because of work. The Assistant Commissioner noted that Pariso ended her employment in February 2020, eight months before Nick was institutionalized. She concluded "it is unclear who was caring for [Nick] during the entire period at issue if a nursing home level of care was necessary."

With respect to the repayment of Phil's remaining loan balance of \$34,451.22 through payment of services instead of cash reimbursement, the Assistant Commissioner concluded there was no evidence demonstrating that Nick agreed to this arrangement, or any documentation of the loan itself. She therefore also concluded Nick's September 2020 transfer of \$14,000 to Phil was not for his son's overpayment of services rendered on Nick's behalf, but rather was done for the purposes of qualifying for Medicaid benefits.

³ Stone testified that she cared for Nick until February 2019, which would have been within the two-year period prior to his institutionalization.

The Assistant Commissioner reversed the ALJ's initial decision and modified the penalty period set by the CWA. Concluding the fair market value of Nick's home when transferred to Phil was only \$231,176.74, the Assistant Commissioner determined Nick transferred \$279,627.96 in assets "in order to establish Medicaid eligibility," and she modified the penalty period to 782 days. This appeal followed.

I.

Nick argues the Division acted arbitrarily and capriciously by rejecting the ALJ's initial determinations that the transfer of his home to Phil was exempt from penalty under the child caregiver exemption, N.J.A.C. 10:71-4.10(d)(4), and by rejecting other disbursements from Nick's funds as a loan to Phil that Phil excessively reimbursed through payment of necessary services provided to Nick and the property. We affirm in part and reverse in part.

Our review is limited. R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 260–61 (App. Div. 2014) (citing Karins v. City of Atlantic City, 152 N.J. 532, 540 (1998)). "An administrative agency's decision will be upheld 'unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Id. at 261 (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the

[party] challenging the administrative action." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 349 (App. Div. 2010) (alteration in original) (quoting In re Arenas, 385 N.J. Super. 440, 443 (App. Div. 2006)).

"Deference to an agency decision is particularly appropriate where interpretation of the Agency's own regulation is in issue." I.L. v. N.J. Dep't Hum. Res., Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 364 (App. Div. 2006). "On the other hand, an appellate court is 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.'" R.S., 434 N.J. Super. at 261 (quoting Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affs. of Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973)).

Moreover, "if our review of the record shows that the agency's finding is clearly mistaken, the decision is not entitled to judicial deference." A.M. v. Monmouth Cnty. Bd. of Soc. Servs., 466 N.J. Super. 557, 565 (App. Div. 2021) (citing H.K. v. N.J. Dep't of Hum. Servs., 184 N.J. 367, 386 (2005)). The same is true "where an agency rejects an ALJ's findings of fact." Ibid. (citing H.K., 184 N.J. at 384).

When the ALJ makes express credibility findings, "it is not for us or the agency head to disturb that credibility determination, made after due consideration

of the witnesses' testimony and demeanor during the hearing." H.K., 184 N.J. at 384. Pursuant to N.J.S.A. 52:14B-10(c),

[t]he agency head may not reject or modify any findings of fact [by the ALJ] as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious[,] or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

"When an ALJ has made factual findings by evaluating the credibility of lay witnesses, the [agency] may no longer sift through the record anew to make its own decision," even if that decision "is independently supported by credible evidence." Cavalieri v. Bd. of Trs., Pub. Emps. Ret. Sys., 368 N.J. Super. 527, 534 (App. Div. 2004). Where the record "can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Id. at 537. We apply these standards here.

II.

In a similar factual context, we recently reviewed in detail the Medicaid program and its accompanying regulatory scheme, in particular, the sixty-month period before an individual is institutionalized, during which the CWA may "look-back" at a transfer of assets and presume it was "made to obtain earlier Medicaid

eligibility than that to which the applicant would otherwise be entitled." A.M., 466 N.J. Super. at 566 (citing N.J.A.C. 10:71-4.10(i)). An applicant, however, retains the right to rebut the presumption. N.J.A.C. 10:71-4.10(j). We can provide no better roadmap than our colleagues did in A.M.

"An exception to the transfer penalty applies when an applicant transfers [their] interest in [their] home to [their] child under certain circumstances." Id. at 567. Under the child caregiver exemption established by N.J.A.C. 10:71-4.10(d)(4), the applicant is "not . . . ineligible for an institutional level of care because of the transfer of his or her equity interest in a home which . . . []served immediately prior to entry into institutional care[] as the individual's principal place of residence," if the home was transferred to certain categories of people, including:

A son or daughter of the institutionalized individual . . . who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual and who has provided care to such individual which permitted the individual to reside at home rather than in an institution or facility.

The care provided by the family member must exceed "normal personal support activities" and the individual's physical or mental condition must be such that he or she "require[d] special attention and care." N.J.A.C. 10:71-4.10(d)(4)(i). "The care provided . . . shall have been essential to the health and safety of the

individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual." Ibid. (emphasis added). "The regulation reflects the language of a federal statute, 42 U.S.C.A. § 1396(p)(c)(2)(A)(iv), the intent of which is to provide relief where a child provided care for two years that prevented the institutionalization of a parent. The applicant bears the burden of establishing entitlement to the exemption." A.M., 466 N.J. Super. at 567–68.

A.

We first consider the Assistant Commissioner's determination that Nick's transfer of his home to Phil in August 2019 for less than market value was subject to a transfer penalty.

Acknowledging that hearsay evidence is admissible in contested cases, the Assistant Commissioner noted "a residuum of legal and competent evidence" must exist to support factual findings. She concluded the certifications of Dr. Solomon, Ellen Pariso, and Sophie Goncalves constituted hearsay evidence that was uncorroborated by supporting documentation. The Assistant Commissioner held that because none of the certifications were supported by legally competent evidence, all the "certifications should not have been considered [by the ALJ] in

making a determination in this matter." However, this categorical exclusion of the evidence represents a fundamental misunderstanding of the law.

Parties in administrative proceedings are "not . . . bound by rules of evidence," N.J.S.A. 52:14B-10(a)(1), and hearsay evidence "shall be accorded whatever weight the judge deems appropriate," N.J.A.C. 1:1-15.5(a). The residuum rule referenced by the Assistant Commissioner provides: "Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b).

While "a fact finding or a legal determination cannot be based on hearsay alone[, h]earsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony." Weston v. State, 60 N.J. 36, 51 (1972). "The competent evidence standard applied to ultimate facts requires affirmance if the finding could reasonably be made." Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359-60 (2013). The ALJ found the certifications of Pariso and Goncalves supported and gave added probative force to the testimony of Phil and Dr. Lim, which was legally competent proof. The Assistant Commissioner's determination that the certifications "should not have been considered" by the ALJ was legally incorrect.

More importantly, the Assistant Commissioner gave short shrift to the ALJ's extensive findings based on the testimony of the four witnesses who appeared before him, all of whom the ALJ found credible. As we already noted, while an agency head may reject or modify the ALJ's findings of fact regarding credibility, she may not do so "unless it is first determined from a review of the record that the findings are arbitrary, capricious[,] or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c). The final agency decision in this case falls short of this statutory requirement because it hardly discussed the testimony of the witnesses. Rather, the Assistant Commissioner's final decision cherry-picked perceived inconsistencies in the witnesses' certifications, and between those certifications and the certifications of Dr. Solomon, Pariso and Goncalves, certifications that the Assistant Commissioner determined should not have been considered at all.

Although not expressly stating her reasons, the Assistant Commissioner apparently rejected the ALJ's credibility findings regarding Dr. Lim by examining the doctor's notes from August 2017 to January 2018, and concluding they failed to demonstrate Nick "needed a nursing home level of care for the years immediately preceding [his] institutionalization." She also noted Dr. Lim had not examined Nick during the relevant two-year-time period and found it "unclear what basis Dr. Lim

relies upon in her certification . . . to now state that [Nick] required supervision of his [ADLs]."

Interestingly, the notes describe Nick as not "need[ing] help with ADLs just yet[,]" being "oriented to season, place, and self only but not to date, day or year," and having "good attention but very poor visual and spatial orientation and executive function as well as poor recall." (Emphasis added). The Assistant Commissioner ignored the doctor's testimony before the ALJ, which explained that although Nick technically may have been capable in early 2018 of using the bathroom by himself and taking his medications, i.e., performing some ADLs, much of that was a function of "pure muscle memory." The doctor explained "any time there's a change in that regimen he will not be able to adjust, because part of . . . dementia syndrome is you cannot make new memory." Dr. Lim testified that Nick was not capable, even in January 2018, of living alone safely because of his degree of cognitive impairment. She noted "the decline and the deterioration will happen with every passing day."

There is sufficient credible evidence in the record to support the conclusion that Nick needed care that exceeded normal support activities for at least two years prior to his institutionalization and that Peter, Carol, and others provided such a level of care, which allowed Nick to remain at home rather than become institutionalized. Both Dr. Lim's notes and her testimony demonstrate Nick's prognosis in January

2018 was poor and certain to decline, and that he would surely need assistance with his ADLs. Phil's and Carol's credible testimony regarding Nick's decline was further supported by Stone's.

Under our standard of review, if we are "satisfied . . . that the evidence and the inferences to be drawn therefrom support the agency head's decision, then [we] must affirm even if [we] . . . would have reached a different result." In re Young, 202 N.J. 50, 70 (2010) (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)).

If, however, the Appellate Division's review of the record leaves it with the feeling that the [Assistant Commissioner]'s

finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction, then . . . it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. While this feeling of "wrongness" is difficult to define, because it involves the reaction of trained judges in the light of their judicial and human experience, it can well be said that that which must exist in the reviewing mind is a definite conviction that the [agency] went so wide of the mark, a mistake must have been made. This sense of "wrongness" can arise in numerous ways — from manifest lack of inherently credible evidence to support the finding, obvious overlooking

or underevaluation of crucial evidence, a clearly unjust result, and many others.

[Clowes, 109 N.J. at 588–89 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).]

Here, the Assistant Commissioner failed her statutory duty to address the ALJ's express credibility findings and explain why they were "arbitrary, capricious[,] or unreasonable or . . . not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B–10(c). Moreover, the scant evidence marshaled by the Assistant Commissioner to sustain alternate findings, while completely failing to address the credible testimony of the witnesses, leaves us with that sense of "wrongness" that the Court described in Clowes and requires our intervention. The substantial credible evidence demonstrated that the level of care Nick required during the two years prior to his institutionalization "exceeded normal personal support activities," was provided in his home by his family who lived with him during that time and allowed Nick to remain in his home rather than reside in an institution. Nick's 2019 conveyance of his home to his son met all the requirements of the caregiver exemption in N.J.A.C. 10:71-4.10(d)(4).

We therefore reverse the Division's assessment of a \$279,627.96 transfer penalty and remand the matter to the Division for an appropriate adjustment to its approval of Nick's Medicaid benefits.

B.

We reach a different result regarding the other transfers. The ALJ found that Phil made direct payments to certain providers of goods and services for the benefit of Nick and the Roselle property, and that these payments offset the remaining \$34,451.22 Phil owed on the \$51,077.33 loan Nick made to his son years earlier to start a business. The ALJ determined these transfers were governed by N.J.A.C. 10:71-4.10(b)(6)(ii), which provides:

In regard to transfers intended to compensate a friend or relative for care or services provided in the past, care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation. Thus, a transfer of assets to a friend or relative for the alleged purpose of compensating for care or services provided free in the past shall be presumed to have been transferred for no compensation. This presumption may be rebutted by the presentation of credible documentary evidence preexisting the delivery of the care or services indicating the type and terms of compensation. Further, the amount of compensation or the fair market value of the transferred asset shall not be greater than the prevailing rates for similar care or services in the community. That portion of compensation in excess of the prevailing rate shall be considered to be uncompensated value.

[(Emphasis added).]

As to the \$12,500 paid to Goncalves for cleaning services, the ALJ found the services necessary for Nick's care because of his urination problems, and the

schedule Goncalves provided supported Phil's testimony that the services were not provided free of charge. The ALJ also found \$10,000 in caregiver services were necessary to enable Nick to remain in his home and, there was no presumption that these services were rendered at no cost. The ALJ further determined \$21,000 in roof and siding repairs, and \$5,150 in driveway repairs, constituted regular maintenance of Nick's home and were typically exempted from a transfer penalty. Lastly, the ALJ found that because all the services and payments were reasonable and necessary, it was proper to offset Phil's outstanding loan balance with the payments made on Nick's behalf, and because Phil's payments exceeded what he owed to his father, the September 2020 disbursement should not be subject to a transfer penalty. Essentially, the only support for these findings was Nick's and Stone's testimony, and, to some extent, Pariso's and Goncalves' certifications with attachments.

The Assistant Commissioner properly determined Phil provided no documentation for the original loan or its repayment terms. While she accepted the documentation showing that Phil and Carol paid for certain services, the Assistant Commissioner found no "nexus" between the outstanding loan balance and the payment for these services, and no credible evidence showing Nick agreed to accept repayment of the loan in this manner. We find no basis to disturb the Division's final decision in this regard.

At issue was the original transfers of \$51,077.33 from Nick to Phil which occurred within the look-back period, and the \$14,000 September 2020 withdrawal from Nick's account, ostensibly to reimburse Phil for paying more through in-kind services than he actually owed to his father. These transfers were presumptively subject to transfer penalties, and the burden was on Nick to "present[] convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose" than to establish Medicaid eligibility. N.J.A.C. 10:71-4.10(j). The purported purpose was a loan for Nick to start a business. The Assistant Commissioner properly determined there was no documentary evidence of the loan Nick purportedly made years earlier to Phil, but she accepted that payments Phil made to Nick's account reduced the balance of monies he owed to his father to \$34,451.22.

The essence of Nick's argument is that the monies he transferred to Phil as a purported loan should not be subject to a transfer penalty because they were more than reimbursed by Phil's payment for the in-kind services. By its terms, N.J.A.C. 10:71-4.10(b)(6)(ii), which the ALJ concluded controlled, addresses the provision of in-kind services provided by a friend or relative that are presumptively uncompensated, meaning Phil presumptively could not be compensated for paying for these services by forgiving his pre-existing debt. This regulatory presumption

"may be rebutted by the presentation of credible documentary evidence preexisting the delivery of the care or services indicating the type and terms of compensation." Ibid. (emphasis added). There was no such evidence here. More importantly, the Assistant Commissioner properly concluded there was "no nexus" between the purported loan balance and its repayment by providing in-kind services to Nick and the property.

The Division's final decision in this regard was not arbitrary, capricious, or unreasonable. We affirm the Division's assessment of a \$48,451.22 transfer penalty to Nick's Medicaid benefits.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION