MEMORANDUM

SUPREME COURT : QUEENS COUNTY

IA PART 14

X INDEX NO. 3928/09

In the Matter of the Application of

MOTION SEQ. NO. 1

MARTIN STERN,

BY: ELLIOT, J.

DATED: November 23, 2009

- against -

RICHARD F. DAINES, M.C., et al.

X

In this Article 78 proceeding petitioner Martin Stern seeks a judgment vacating and reversing the October 28, 2008 Decision After a Fair Hearing issued by the Commissioner of the New York State Department of Health; and directing the New York City Human Resources Administration to re-determine petitioner's eligibility for medical assistance without relying on the policies set forth in the New York State Department of Health General Information System message GIS 07 MA/019, without refusing to take into account services rendered prior to the date petitioner would otherwise have been Medicaid

eligible and services associated with companionship, and without regard to the durable power of attorney from the petitioner dated March 4, 2006; and awarding attorney's fees against the Commissioner of the Department of Health pursuant to 42 USC § 1988, and against respondent Robert Doar, Commissioner of the New York City Human Resources Administration, pursuant to 42 USC § 1988. The New York City Human Resources Administration cross moves to dismiss the petition on the grounds of lacks of personal jurisdiction, and in the alternative seeks an order transferring the proceeding to the Appellate Division, Second Department. Petitioner cross moves for an order to join Robert Doar, Commissioner of the New York City Human Resources Administration, as a respondent.

The parties, in a stipulation dated May 26, 2009, agreed that Robert Doar, Commissioner of the New York City Human Resources Administration,(City respondent) has been personally served as a respondent and that branch of the City respondent's cross-motion to dismiss the petition on the grounds of lack of personal jurisdiction was withdrawn. Petitioner's cross motion to join Robert Doar, in his official capacity, as a respondent, was also withdrawn.

Petitioner Martin Stern, then aged 94, entered the Fairview Nursing Home Care Center, a Residential Health Care Facility on February 17, 2006. Mr. Stern executed a durable power of attorney, dated March 4, 2006, in which he appointed Leah K. Indelman to act as attorney in fact in all matters as indicated therein. Mr. Stern executed an addendum to the power of attorney, dated March 4, 2006, which gave Ms. Indelman additional powers,

including the power to act in his name in matters pertaining to "Social Security, Medicare, Medicaid, and all governmental benefits, to represent me or obtain representation for me at hearings and appeals", and "[t]o make decisions regarding my domicile or residence including executing documents or issuing statements concerning my intentions as to my residency or domicile."

On March 31, 2006, Ms. Indelman entered into a personal service support and maintenance contract with Mr. Stern, which was executed by Martin Stern, by "Leah K. Indelman poa", [as attorney-in-fact], and by Leah Indelman, individually. The contract provided that Ms. Indelman was to be paid the amount of $2,100.00 a month, or $35.00 an hour, with a minimum of 15 hours a week, over Mr. Stern's lifetime, which was calculated as 3.59 years, based upon New York State's Medicaid regulations found in 96 ADM 8. Ms. Indelman contracted to provide on an "as needed basis", the monitoring of Mr. Stern's health care, securing health care, and the monitoring his living arrangements, and to provide maintenance services for these services and in general, from his funds. In the event that Mr. Stern had no funds, or ran out of funds, Ms, Indelman is under no obligation to pay for services rendered to Mr. Stern. The contract provides for a maximum compensation of $90,468.00, and further provides that the at the time of Mr. Stern's death, the unpaid balance will be paid to Ms. Indelman, and that there would be no refund of funds by Ms. Indelman to Mr. Stern's estate at the time of his death.

On October 2, 2006, a promissory note was executed in the sum of $63,000.00, with a maturity date of August 31, 2007, payable by Ms. Indelman, but not signed in her capacity as Mr. Stern's agent. On February 28, 2007, Mr. Stern applied for Residential Health Care Medical Assistance(Medicaid) for a household of one consisting of himself. In a notice dated May 16, 2007, the New York City Department of Social Services(City Agency) informed Mr. Stern that it had determined that property assets in the amount of $225,166.52 had been transferred from his accounts for the purpose of qualifying for Medical Assistance, but that documentation to rebut this presumption could be submitted to the City Agency for reconsideration.

A request for reconsideration was made on July 31, 2007, and the City Agency in a determination dated January 17, 2008 found that the promissory note dated October 2, 2006 in the sum of $63,000.00 was acceptable and was not considered a transfer that was for uncompensated value. The City Agency, however, determined that the Personal Services Contract dated March 31, 2006 was not acceptable, and therefore certain bank assets were transferred for less than fair market value, and modified downward the uncompensated value of the transferred assets to $158,366.52.

In a notice dated January 24, 2008 the City Agency accepted Mr. Stern's application for Medicaid, effective April 1, 2008, subject to a penalty period of 16.8 months on the grounds that there was a transfer of assets for less than fair market value in the amount of $158,366.52 in order to qualify for Medicaid. The City Agency determined the penalty

of 16.8 months by dividing $158,366.52 by $9,375.00, the applicable regional rate in 2007. During the penalty period of 16.8 months Mr. Stern would not receive Medicaid coverage for the cost of the nursing facility. Mr. Stern requested a fair hearing on June 1, 2007, which was conducted over a series of dates between November 21, 2007 and October 3, 2008. Ms. Indelman appeared and testified at the fair hearing, and counsel for Mr. Stern was present and made statements on his behalf. Ms. Indelman testified that she is not related to Mr. Stern, that he is a family friend and that after her husband died, Mr. Stern moved into her apartment in Queens, in 1986 and that he resided there for the next twenty years. She stated that Mr. Stern occupied a separate bedroom and paid half of the rent and grocery bills, and that only her name was on the lease. She stated that in February 2006, Mr. Stern had a medical incident and was hospitalized in Brooklyn and thereafter was discharged to Fairview Nursing Home where he presently resides. Ms. Indelman testified that for two years she went to see Mr. Stern every day from 4:00 P.M. to 9:00 P.M., and that she spent ten hours a day with him on the weekends; that she works during the day as a teacher; that Mr. Stern is a writer of poems, short stories and articles, and that she performs editorial translations of poems he wrote, transcribes his memoirs, and spoke or met with a publisher; that she transports him to and from the eating cafeteria; that she brings him clothes as needed; that she receives his prescription medication bills and pays these bills; that she transfers his monthly social security payments in order to pay the nursing home; that she brings him a newspaper, candy, fruit, cookies, books; that she purchased a quilt, post-its and paintbrushes

for his use; that she received the money under the personal services contract in a lump sum payment but had put it away until everything is cleared up; and that she would not have visited Mr. Stern with the same frequency and number of hours that she did, had she not been paid for her managerial and executive assistant services. She also stated that Mr. Stern is the president of a workman's circle group and participates in a poetry group, and that she takes him to these activities which are not held at the nursing home.

At the fair hearing, counsel for Mr. Stern placed into evidence the GIS 07 MA/019 for consideration in connection with the personal services contract and the statements made by Ms. Indelman at the hearing. Ms. Indelman submitted copies of the care logs she maintained regarding the services she provided.

A Decision After a Fair Hearing (ADFH) was issued by the Commissioner of the Department of Health's designee on October 28, 2008. The Commissioner's designee determined that the City Agency's determination of January 24, 2008, which found that Mr. Stern had transferred resource assets for less than fair market value, resulting in a penalty period of 16.8 months, was correct. The Commissioner's designee stated, under the heading "applicable law" the following regulations, statutes, and internal administrative messages and directives: 18 NYCRR §§ 360-4.1, 360-4.4 and 360-4.8(b); Social Services Law §366.5(d) and(e); GIS 07 MA/018; 06 OMM/ADM-5; 96 ADM-8; and GIS 07 MA/019. The Commissioner's designee stated that:

> "A review of the Personal Services Contract provided at the present fair hearing notes the following features of the contract. The Appellant, then age

94 years, had a life expectancy of 3.59 years pursuant to guidelines in 96ADM 8. Furthermore the contract preamble states that the Appellant's Representative(agent) was to receive $2,100.00 per month or $35.00 per hour for services performed for the Appellant's life expectancy, that is for the total compensation amount of $90,468.00 for the 3.59 life expectancy."

"The Appellant's Representative (agent) agreed pursuant to the contract that services were on an "as needed basis" and were as follows: to monitor health care, to secure health care, and to monitor appropriate living arrangements for the Appellant, for approximately 15 hours per week. Furthermore the Appellant's Representative (agent) was under no obligation according to the contract to pay for maintenance needs of the Appellant if the Appellant had no funds available. In section 3(c) the contract provided that services were to be performed for lifetime of the Appellant AND that there would be no refund of prepaid funds by the Appellant's Representative if she were unable to provide the services or if Appellant's death occurred before his calculated life expectancy and therefore to his estate."

"GIS 07 MA/019 provides guidelines to evaluate personal services contracts for Medicaid eligibility, and further provides additional parameters on the transfer penalty period. Accordingly for Medicaid eligibility in this particular personal services contract did the Appellant receive or will he receive fair market value for the resources transferred to the Appellant's representative, that is to the caregiver.

The Appellant's representative established at the fair hearing through her attorney and the documents submitted for evidence that they were aware of the provisions in GS 07 MA/019. The record establishes that the instant personal services contract would not meet the evaluation guidelines in two instances. First the contract did not provide for the return of any prepaid funds if the Appellant's representative, the caregiver, becomes unable to fulfill her duties under the contract, or if the Appellant died before his calculated life expectancy. Without such a provision the transfer of assets must be treated as a transfer for less than fair market value. The second instance was that this personal services contract provided that the services will be delivered on an "as needed" basis. In such a provision, the Agency cannot make a determination that fair market value will be received in the form of services provided through the contract. Therefore a transfer of assets penalty must be calculated for an otherwise eligible individual."

> "As for the transfer penalty imposed of 16.8 months GIS 07 MA/019 provides that in calculating a transfer of assets penalty for a personal services contract the district may evaluate and by reduce the transfer amount, for the value of any services actually received from the time the personal services contract was signed and funded through the date of the Medicaid eligibility determination. However it also clearly states that no credit is allowed for services that are provided as part of the Medicaid nursing home rate. To assess the value of the furnished services, the district must be provided with credible documentation of the services already provided. A review of the case logs completed by the Appellant's representative, the caregiver, appeared on first impression to be documents that contain visits and routine tasks associated with companionship. As to medical services implied or established by the Appellant's representative's testimony and the logs these services appeared to be done in the context of a nursing home of which no complaints were made as to Appellant's care. Any amount credited for caregiver services actually provided must be commensurate with a reasonable wage scale, based on fair market value for the actual job performed and the qualification of the caregiver. If credible documentation is not provided, then no credit is deducted when calculating the uncompensated transfer amount."
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> "Furthermore in this instant case, the Appellant's representative has the right, obligation and responsibility as the Appellant's agent per the Power of Attorney to change such residential nursing setting so that all required services might be met for Appellant's care. To state that services are being provided by her caretaking and not provided by the Nursing home is at variance with the legal responsibility she had knowingly assumed on behalf of the Appellant. Therefore based upon the record established at the fair hearing and upon review of the documents submitted the Agency's determination is affirmed."

Petitioner Martin Stern thereafter commenced the within proceeding to vacate and reverse the October 28, 2008 DAFH and to direct the City respondent to re-determine petitioner's eligibility for medical assistance without relying on the policies set forth in the Department of Health's message GIS 07 MA/019, without refusing to take into account services rendered prior to the date petitioner would otherwise have been Medicaid eligible and services associated with companionship, and without regard to the durable power of

attorney from the petitioner dated March 4, 2006. Petitioner also seeks an award of attorney's fees against the State respondent and the City respondent, pursuant to 42 USC § 1988.

Petitioner alleges in his first cause of action that the DAFH is affected by an error of law, in that the hearing officer relied upon the Department of Health's General Information Systems message GIS 07 MA/019, and that said GIS message constitutes a "rule" and was not filed as a rule with the Secretary of State after publication in the State Register, after notice and comment, in violation of Article 4, Section 8 of the New York State Constitution, State Administrative Procedure Act § 102, and Executive Law § 102.

The second cause of action alleges that the DAFH is affected by an error of law, in that it relied upon a methodology for determining Medicaid eligibility set forth in General Information Systems message GIS 07 MA/019, which is more restrictive than the methodology utilized under the SSI in Section SI 01150.005 of the POMS, in violation of 42 USC § 1396(a)(10)(C)(i)(III) and 1396a(r)(2), for which relief is available pursuant to 42 USC § 1983.

The third cause of action alleges that the DAFH is affected by an error of law and is arbitrary and capricious, as it did not consider the services rendered prior to the petitioner having otherwise been Medicaid eligible as having any fair market value, even though such services were not then being provided as part of the Medicaid nursing home rate, since the petitioner was not then Medicaid eligible and that they were "routine tasks associated with companionship" rather than medical services; and in that the Hearing Officer

attributed to Ms. Indelman the authority under the durable power of attorney to make decisions about his place of residency that is not granted to her under the power of attorney, or to an attorney of fact pursuant to General Obligations Law, Article 5, Title 15.

The State respondent asserts that the DAFH should be affirmed as it was neither arbitrary nor capricious and has a rational basis in the law and the record. It is asserted that the State respondent was not required to promulgate GIS 07 MA/019 as a rule under the State Administrative Procedure Act (SAPA) after notice and comment rule making, as the agency's statements contained in said guideline are expressly excluded from the statutory definition of a rule; that the State respondent's transfer of assets rule, set forth in Social Services Law § 366(5), is not analogous or in any way restricted by 42 USC §1396a; that the DAFH is supported by the evidence and testimony presented as the fair hearing; and that the personal services contract is not a contract for fair market value because it provides for services on an "as needed basis", provides for services that are duplicative of those the petitioner is already receiving, and does not provide for the return of prepaid funds. It is further asserted that the DAFH correctly affirmed the City respondent's determination to impose a penalty period.

The State respondent, in view of the decision by the Appellate Division, Fourth Department, in *Matter of Carmella Barbato v New York State Dept. of Health* (65 AD3d 821, [August 21, 2009]), now states that it has no objection to remanding this matter to the local social services district for the limited purpose of re-evaluating the value of any services

actually received from the date of execution and funding of the "Personal Service Support and Maintenance Contract" between Martin Stern and Leah K. Indelman, to the date of the Medicaid eligibility determination.

The court has reviewed the allegations set forth in the petition, and finds that petitioner has not raised an issue as to whether the DAFH is supported by substantial evidence. Therefore, that branch of City respondent's cross motion, as well as the objections in point of law set forth in the State respondent's amended verified answer, which seek to have this proceeding transferred to the Appellate Division, Second Department are denied (see CPLR 7804[f]).

It is well settled that the court's power to review an administrative action is limited to whether the determination was warranted in the record, has a reasonable basis in law, and is neither arbitrary nor capricious (*see Scherbyn v Wayne-Finger Lakes Board*, 77 NY2d 753, 758 [1991]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]; *Westmoreland Apt. Corp. v N.Y. City Water Bd.*, 294 AD2d 587, 588 [2002]). The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (*Ostrer v Schenck*, 41 NY2d 782, 786 [1977]; *see also Pell v Board of Education*, 34 NY2d 222, 231 [1974]).

An agency's interpretation of its own regulations "is entitled to deference if that interpretation is not irrational or unreasonable" (Matter of Gaines v New York State Div. of Hous. & Community Renewal, 90 NY2d 545, 549,[1997]; *see Samiento v World Yacht*

Inc., 10 NY3d 70, 79, 883 NE2d 990,[2008]). Put another way, the courts will not disturb an administrative agency's determination unless it lacks any rational basis (*see Matter of IG Second Generation Partners L.P. v. New York State Div. of Hous. & Community Renewal*, 10 NY3d 474 [2008]; *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149, [2002]).

In *Matter of Barbato v New York State Dept. of Health* (*supra*) the Appellate Division, Fourth Department, issued a single memorandum decision, dated August 21, 2009, which was specifically made applicable to the parties in *Matter of Goddard v New York State Department of Health* (65 AD3d 824[2009]), *Matter of Kinne v New York State Department of Health* (65 AD3d 824 [2009]; *Matter of Caulkins v New York State Department of Health*,(65 AD3d 825, [2009]) and *Matter of Jackson v New York State Department of Health* (65 AD3d 825[2009]). In *Barbato*, the court stated that in each case, the petitioners filed Article 78 proceedings challenging the respective determinations of the Department of Health which upheld the findings of the local social service agencies which found the petitioners currently ineligible for Medicaid because they transferred assets for less than fair market value during the "look back" period set forth in Social Services Law § 366(5)(e). The court found as follows:

> "Pursuant to personal service agreements (PSAs) between petitioners and their respective caregivers, the caregivers agreed to perform certain personal services for the petitioners for the remainder of each petitioner's lifetime in exchange for a bulk transfer of assets to the caregiver. The parties to those agreements stipulated that the amount transferred constituted the fair market value of the personal services, which was determined by multiplying the hourly

> cost of the services, which ranged from $12 to $15 an hour, by both the estimated number of hours of work that they would be performed and the life expectancy of each petitioner. The life expectancy of each petitioner was determined based upon a chart published by the New York State Department of Health". The PSA involving Carmella Barbato ... provides that the caregiver is to perform services for "at least" 15 hours per week, while the PSAs in the four remaining proceedings provide for services for those petitioners on an "as needed" basis. All of the PSAs provide that there is to be no refund to the estate of any of the five petitioners who dies before the end of his or her projected life expectancy."

The *Barbato* court found that substantial evidence supported the determination in each proceeding that the transfer of assets for services to be rendered between the time of the determinations of the respective Departments of Social Services through the remainder of the lifetime of each petitioner was for less than fair market value. The court stated that:

> "With respect to the proceedings involving PSAs containing the aforementioned "as needed" language, these petitioners cannot demonstrate that the transfer of assets for prospective services was for a fair market value, because there is no basis on which to conclude that the transfer of a specific amount of assets for services that may or may not be rendered is for fair value. Moreover, given the absence of a refund provision in any of the PSAs in question, the possibility remains that a caregiver will receive a windfall in the event that the respective petitioner fails to meet his or her life expectancy, and it thus cannot be said that the subject transfers were for fair market value. We conclude, however, that the determinations fail to account for the fair market value of services rendered between the date on which each PSA was executed and the date on which the respective determinations were made."
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> "In our view, substantial evidence supports the determinations that services provided by caregivers that are duplicative of services afforded petitioners by the nursing facilities in which they reside are non-compensable for the purpose of calculating the relevant periods during which petitioners are ineligible for medical assistance benefits (*see Gabrynowicz*, 37 AD3d 464, 465; *see generally Estate of Barnett v Department of Health & Human Servs.*, 2006 Me. Super. LEXIS 116, 2006 WL 1668138 [Me Super 2006]; *cf. Gold v United*

> *Health Servs. Hosps.*, 95 NY2d 683, 690-691,; *Matter of Chase v New York State Dept. of Social Servs.*, 252 AD2d 612, 613, *lv denied* 92 NY2d 813). Inasmuch as service logs kept by the caregivers for each petitioner are included in the record, the aforementioned duplicative services may be identified, and the services provided distinguished from those yet to be provided. Moreover, the fair market value of the non-duplicative services performed may be determined and used in calculating each of the periods during which petitioners are ineligible for medical assistance benefits"(*Id* at 821).

In *Barbato* the court remitted the matters to the respective Departments of Social Services to determine the eligibility of each petitioner for Medicaid between the date on which each personal services agreement was executed and the date on which the respective determinations were made following recalculation of the period set forth in Social Services Law § 366 (5). The court further noted that the determination of the issue whether certain services are duplicative of those provided by the nursing facilities may be facilitated by reference to the standards for services in such facilities set forth in 10 NYCRR 415.1 through 415.27.

Petitioner's contention that GIS 07 MA/019 is a "rule" and that the failure to follow the procedures set forth in the State Administrative Procedure Law renders the DAFH invalid, is rejected. State Administrative Procedure Act § 202 (1)(a) states, in relevant part that: "Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." A "rule" is defined by the State Administrative Procedure Act to include "the whole or part of each agency statement,

regulation or code of general applicability that implements or applies law," but excludes "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (State Administrative Procedure Act § 102 [2][a][i]; [b][iv]; *see Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 279,[2003]; *Matter of Suffolk Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd.*, 47 AD3d 133, 136, [2007], *lv granted* 10 NY3d 706, [2008]; *Matter of HMI Mech. Sys. v McGowan*, 277 AD2d 657, 658,[2000], *lv denied* 96 NY2d 705, [2001]; *see also Cubas v Martinez*, 8 NY3d 611, 621, [2007]). A rule is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" (*Matter of New York City Tr. Auth. v New York State Dept. of Labor*, 88 NY2d 225, 229, [1996], quoting *Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 66 NY2d 948, 951, [1985]; *see Matter of Cordero v Corbisiero*, 80 NY2d 771, 772-773, [1992]; *Matter of Taylor v New York State Dept. of Correctional Servs.*, 248 AD2d 799, 800, [1998]). There is no clear bright line between a "rule" or "regulation" and an interpretative policy (*see Cubas v Martinez, supra*).

Social Services Law 366(5)(d)(3)provides that for transfers made after August 10, 1993 that "[i]n determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual ... for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services for the time specified in subparagraph four of this paragraph".

An identical provision is found in subdivision (e)(3) for transfers made after February 8, 2006.

The Department of Health's General Information System message GIS 07 MA/019, was not filed in the Department of State, was not published as a rule, and was not preceded either by a notice of proposed rulemaking or by an opportunity for public comment. The GIS 07 MA/019 states that it is intended to serve as a guide for social services districts in evaluating personal services contracts and that "[f]or Medicaid eligibility purposes, a determination must be made as to whether the applicant received or will receive fair market value (FMV)for the resources transferred to the caregiver. If a determination cannot be made that the applicant will receive FMV for the resources transferred, the resources are subject to a transfer penalty". GIS 07 MA/019 describes two types of uncompensated transfers: (1) where the personal service contract does not provide for the return of any prepaid monies if the caregiver becomes unable to fulfill her or her duties, or if the applicant or recipient dies before his or her calculated life expectancy; or (2) if the personal service contract stipulates that the services will be performed on an "as needed" basis. In each case, the message explains why fair market value cannot be determined if such provisions are included in personal services contracts.

In addition, GIS 07 MA/019 provides guidance as to when to evaluate a personal services contract, when a credit should be given to an applicant or recipient, and the

need for credible documentation, such as a detailed service log, in order to assess the value of the furnished services.

GIS 07 MA/019 does not prohibit the use of personal services contracts, does not require that contracts containing the language objected to must be treated as void or voidable, and leaves open the possibility that additional terms may be included in the same contract that would be curative, or otherwise establish that an applicant or recipient's resources have been, or will be, transferred for fair market value. The message does not create any new rules or obligations, is not the source of the legal obligation that a personal service contract must be a transfer for fair market value, and does not impose any additional legal duty upon the public. Rather, that obligation is set forth in Social Services Law § 366(5). GIS 07 MA/019 merely provides guidance for the interpretation of an existing statutory requirement and interprets contractual language as it applies to transfers for fair market value, and as such is not a "rule".

In addition, neither the fact that the GIS message is listed under the heading "Applicable Law" in the DAFH, nor its placement on the DOH's internet site, transforms the message into a "rule" within the meaning of the State Administrative Procedure Act.

Finally, it is noted that while the *Barbato* court made no reference to GIS 07 MA/019 in its determination, it also concluded that providing personal services on an "as needed" basis, as well as the failure to include a refund provision, would permit a windfall to the caregiver, and thus precluded a finding that the transfers were for fair market value.

The personal service contract at issue here suffers from the same infirmities as the personal services contracts examined by the *Barbato* court, in that it provides that the services will be provided on an "as needed basis" and fails to contain a refund provision. Therefore, even if the GIS is disregarded, substantial evidence exists in the record and the law to support the respondents' determination as regards the lack of fair market value. Petitioner's request for a re-determination of his eligibility for medical assistance, without reference to the policies set forth in GIS 07 MA/019, therefore, is denied.

Petitioner's claim that the " Medicaid transfer-of-assets rule" as it applies to resources transferred in connection with personal services contracts, violates 42 USC § 1396a(a)(10)(C)(i)(III) [the federal Social Security Income transfer-of-assets rule], is rejected. Petitioner argues that the State Commissioner's determination ignored the memorandum his counsel submitted at the fair hearing regarding the Social Security Administration's policies for determining eligibility under the Supplemental Security Income (SSI) program, as set forth in Section SI 01150.005 of its Program Operations Manual System (POMS). Section SI 01150.005 sets forth instructions for determining whether an individual received fair market value for a resource transferred on or after December 14, 1999, and provides that if a transfer is for less than fair market value, a person may be subject to a period of ineligibility for SSI.

42 USC § 1396a(a)(10)(C)(i)(III) requires that a State's policies be no more restrictive than those of the SSI program with respect to the methodology used for

determining income and resource eligibility, in other words, in determining the amount of a medically needy applicant's available income and resources. The Medicaid transfer-of-assets rule, set forth in 42 USC § 1396p, however, is not included in this methodology, as its purpose is not to determine the availability of the transferred assets to the applicant. Rather, under the Medicaid provisions, the transferred assets are, by virtue of the transfer of ownership, unavailable to the applicant, and neither the federal nor state transfer-of-assets provisions, permits the transferred assets to be "deemed available" to the applicant for the purposes of calculating financial eligibility. Thus, the act of disposing of assets for less than fair market value results in the applicant being disqualified from Medicaid coverage for certain services, even if the applicant is otherwise financially eligible for Medicaid.

Congress specifically enacted separate and distinct transfer-of-assets rules for SSI and Medicaid, with different look-back periods. For SSI, the look-back period remains 36 months, while the look-back period for Medicaid has been extended to 60 months (see 42 USC § 1396p[c][1][B][I]). This extended Medicaid look-back period, enacted in 2005, is intentionally more restrictive than the SSI look-back period. Since a separate transfer-of-assets rule was enacted for the Medicaid program (42 USC § 1396p[c]), the Commissioner was required to follow this rule and not the SSI rule for transfer-of-assets. Therefore, the Commissioner was not required to consider the POMS in the DAFH. It is noted that petitioner does not assert that the DAFH improperly applied the Medicaid transfer-of-assets rule.

Respondents concede that in light of the determination in *Barbato* (*supra*), the matter must be remanded to the City agency for the purpose of re-evaluating the value of any services actually received from the date that the Personal Services Support and Maintenance Contract was executed and funded, to the date of the Medicaid eligibility determination.

However, petitioner's request for a re-evaluation of his eligibility for Medicaid, without regard to the durable power of attorney dated March 4, 2006, is denied. The durable power of attorney and the addendum dated March 4, 2006, are the only documents submitted at the fair hearing that were executed by Mr. Stern, and not by his agent. Absent the power of attorney, Ms. Indelman lacked authority to execute the personal services contract. Thus, plaintiff's request that respondents disregard the power of attorney when re-evaluating the value of services received by Mr. Stern's application between the date of the contract and the date of the Medicaid determination, is without merit.

Furthermore, contrary to petitioner's assertions, the DAFH did not state that the power of attorney permitted Ms. Indelman to have transferred Mr. Stern to another nursing home. Rather, the Commissioner's designee stated that the medical services provided appeared to have been done within the context of a nursing home, and therefore are not entitled to a credit. The DAFH noted that Ms. Indelman stated in her logs that she was providing services, which the nursing home was not providing, and that Ms. Indelman, as Mr. Stern's agent, had "the right, obligation and responsibility ... to change the residential nursing home setting so that all required services might be met for Appellant's care". Under

the addendum to the power of attorney Ms. Indelman has the power to act in Mr. Stern's name as regards his Medicare and Medicaid benefits, and to make decisions regarding his domicile or residence. Therefore, the court finds that the Commissioner properly determined that Ms. Indelman has the power and obligation, to ensure that Mr. Stern is provided the services he is entitled to, within the confines of the nursing home setting.

Petitioner's request for attorney's fees against the City and State respondents pursuant to 42 USC § 1988 and Article 86, is denied as petitioner has failed to establish a claim thereunder.

In view of the foregoing the within petition is granted solely to the extent that matter is remanded to the City agency for the purpose of re-evaluating the value of any services actually received from the date that the Personal Services Support and Maintenance Contract was executed and funded, to the date of the Medicaid eligibility determination. The remainder of the petition is denied in its entirety.

Settle judgment.

J.S.C.