



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

November 3, 2005

Anthony Maddaloni
Cicero, Velazquez, Cicero and Associates, Inc
701 Westchester Ave
Suite 210 W
White Plains, NY 10604

Re: General Counsel Opinion # 05-01
Friedwald Center for Rehabilitation and
Nursing, LLC - Hiring persons who are
relatives of an operator and previous
operator

Dear Mr. Maddaloni:

This in regard to your letter of August 8, 2005 concerning the above facility and the issue of the hiring of relatives of the current operator, who are also relatives of the previous operator, without jeopardizing the facilities ability to rebase its Medicaid reimbursement rate.

You state in your letter that Friedwald Center for Rehabilitation and Nursing changed ownership at the end of 2003 (Project No. 031005) when Friedwald Center for Rehabilitation and Nursing, LLC, with Mr. Barry Winet as the sole member, acquired ownership from Friedwald Center for Rehabilitation and Nursing, Inc. The shareholders of Friedwald Center for Rehabilitation and Nursing, Inc. were David Friedman, M.D., 21.5% shareholder; Ari Friedman, 21.5% shareholder; Golda Fried, 21.5% shareholder; Elisa Mermelstein, 21.5% shareholder; Nachum Sherman, 9% shareholder; Esther Friedman, 2.5% shareholder; and Jack Friedman, 2.5% shareholder.

You also state that as part of the Certificate of Need Application for the change in ownership, the Department required a signed affidavit from Barry Winet indicating that he would not hire Ari Friedman in any capacity at Friedwald Center for Rehabilitation and Nursing. The reason for the affidavit was due to the fact that Ari Friedman was Finance Director of Friedwald Center for Rehabilitation and Nursing, in addition to being a shareholder. You state that the Department was concerned that Ari Friedman's continued employment at the facility would prevent the new operator from rebasing its Medicaid rate due to the provisions of 10 NYCRR Section 86-2.10(k)(5)(i). If the new operator could not rebase the facility's Medicaid rate the financial feasibility of the acquisition would be in question. Consequently, Mr. Winet submitted an affidavit indicating that Friedwald Center for Rehabilitation and Nursing, LLC

would not hire Ari Friedman in any capacity nor would it enter into any agreement for consultative services with him. The affidavit and its restrictions were limited to Ari Friedman due to his position as Finance Director of the facility.

You state that Mr. Winet is interested in now hiring Eli Fried, M.D., husband of Golda Fried, and Howard Mermelstein, husband of Elisa Mermelstein, to part-time, non-director positions, at the facility. Dr. Eli Fried will provide quality assurance oversight in the areas of resident care, and Howard Mermelstein will work in the finance office. Mr. Winet is the brother of Esther Friedman, brother-in-law of the late Jack Friedman, and uncle to David Friedman, Ari Friedman, Golda Fried and Elisa Mermelstein.

You ask whether Mr. Winet may hire Dr. Fried and Mr. Mermelstein without conflict with 10 NYCRR Section 86-2.10 with respect to rates for new operators.

Section 86-2.10(k) of Department regulations states that a new operator of an ongoing facility shall file a cost report for the first 12-month period of operation. Such cost report is used to establish a new base period for Medicaid rate-setting.

Section 86-2.10(k)(5) states in relevant part that the term “new operator” shall not include any operator approved to operate a facility when:

- (d) “a principal stockholder (owning 10 percent or more of the stock), officer, director, sole proprietor or partner of an approved proprietary operator . . . is the spouse . . . of a principal stockholder, officer, director, sole proprietor or partner of the prior operator . . . of such facility . . . ”

While Dr. Fried and Mr. Mermelstein are spouses of stockholders of the prior operator, you have represented that they will not be utilized in any of the prohibited positions identified in § 86-2.10(k)(5)(i)(d) noted above since you have stated they will be in part-time, non-director positions at the facility. Dr. Fried will provide quality assurance oversight and Mr. Mermelstein will work at the finance office. Also the familiar relationship to Mr. Winet is not prescribed by § 86-2.10(k)(5).

Therefore, we conclude, based on the representations in your letter, that the employment of Dr. Fried and Mr. Mermelstein as proposed in your letter would not conflict with 10 NYCRR § 86-2.10(k) with respect to rates for new operators. This conclusion is conditioned on the understanding that Dr. Fried and Mr. Mermelstein would be reimbursed for their services at fair market wages for the region. Any reimbursement for their services in substantial excess of such fair markets wages for the region could be viewed by the Department as an attempt to circumvent applicable Department rules and regulations regarding changes of ownership of health care

Anthony Maddaloni
November 3, 2005
Page 3

facilities.

I trust this answers your question.

Very truly yours,

Donald P. Berens, Jr.
General Counsel

cc: Peter Millock