March 28, 1995

OPINION NO. 95-002

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
105 South Market Street
Lisbon, Ohio 44432

Dear Prosecutor Herron:

You have requested an opinion regarding the eligibility for Ohio Medicaid of a minor child who resides in a long term care facility in Ohio. The child is disabled and has been residing in the facility for approximately two years. As a result of a dependency adjudication, the child is in the temporary custody of the county department of human services. The department would like to transfer custody to the child's grandmother, who resides in West Virginia. It is anticipated that, if the transfer were made, the child would continue to reside at the long term care facility in Ohio. Your question is whether the child would continue to be eligible for Ohio Medicaid.

A member of your staff indicated in a telephone conversation that the custody transferred to the grandmother would be temporary custody. *See* R.C. 2151.011(B)(12). The natural parents would retain residual parental rights, privileges, and responsibilities, which by statute include the privilege of reasonable visitation, consent to adoption, the privilege to determine religious affiliation, and the responsibility for support. R.C. 2151.011(B)(10).

Ohio's Participation in the Medicaid Program

Medicaid is a program under which the federal government provides participating states with a portion of the funds needed to provide medical assistance for various classes of eligible persons. *See* 42 U.S.C.A. §§1396-1396v (West 1992 & Supp. 1994); 12 Ohio Admin. Code 5101:1-39-01. Provisions governing Ohio's participation in the program appear in R.C. Chapter 5111 and rules adopted to implement that chapter. *See* R.C. 5111.02(B); 12 Ohio Admin. Code Chapter 5101:1-39.

Pursuant to R.C. 5111.01, the Ohio Department of Human Services may, if federal funds are provided, grant medical assistance to persons who come within specified categories, including recipients of Aid to Dependent Children (ADC), certain aged, blind, and disabled persons, persons required by federal law to receive medical assistance as a condition of state participation in the

Medicaid program, persons under age twenty-one who would be financially eligible for ADC but do not meet the requirements of R.C. 5107.03 (deprivation of parental support or care), and certain other impoverished children. R.C. 5111.01(A); *see also* R.C. Chapter 5107; 12 Ohio Admin. Code 5101:1-39-37. If state funds are provided, the Department may grant assistance to additional persons, as permitted under the federal program. R.C. 5111.01(B). You have indicated that the child in question is currently receiving Medicaid benefits under Ohio's medical assistance program, but you have not specified the child's category of eligibility. This opinion considers the effect of a change in temporary custody upon the Ohio Medicaid eligibility of a child who resides in a long term care facility.

Determination of Ohio Medicaid Eligibility

The authority to determine in the first instance whether a particular individual is eligible for medical assistance under R.C. Chapter 5111 is, by statute, given to the county department of human services of the county in which the individual lives. R.C. 5111.012 ("[t]he county department of human services of each county shall establish the eligibility for medical assistance of persons living in the county"). That department notifies the Ohio Department of Human Services of its determinations. R.C. 5111.012. Such determinations are subject to administrative and judicial appeals pursuant to R.C. Chapter 119. *See generally Gorenflo v. Ohio Department of Human Services*, 81 Ohio App. 3d 500, 611 N.E.2d 425 (Marion County 1992) (discussing fact-finding and appeals procedure in a case concerning eligibility for Medicaid benefits).

It would be inappropriate for the Attorney General to interfere with the established statutory procedure governing the determination of Ohio Medicaid eligibility by attempting to use a formal opinion to determine the eligibility of a particular individual. *See generally, e.g.*, 1989 Op. Att'y Gen. No. 89-008 at 2-33 (the Attorney General is not authorized to exercise on behalf of another governmental entity discretion that the General Assembly has granted to that entity); 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("it is inappropriate for [the Attorney General] to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals"). Accordingly, this opinion does not make a determination regarding the eligibility of the child in question to continue to receive Medicaid benefits under Ohio's medical assistance program if the child's custody is transferred to the child's grandmother. Instead, this opinion discusses provisions of statute and rule that may be relevant to such a determination and leaves to the county department of human services the application of those provisions to the facts of a particular case.

Effect of a Change in Temporary Custody upon the Ohio Medicaid Eligibility of a Child Who Resides in a Long Term Care Facility

A review of the statutes and rules governing Ohio Medicaid eligibility reveals no respect in which a change in the temporary custody of a child who resides in a long term care facility (LTCF) affects the child's eligibility to continue receiving Ohio Medicaid benefits.[1] Rule 5101:1-39-04 permits an individual who resides in a long term care facility to be eligible for Medicaid, as follows:

> *Individuals who* are admitted for a continuous period of institutionalization or *live in medical institutions may qualify for medicaid.* Medical institution is defined as an institution which is organized to provide medical care, nursing and convalescent care. *A medical institution includes* hospitals, *long term care facilities (LTCFs)* and Title XIX certified areas of state institutions for the mentally ill or people who have mental diseases. *"LTCFs" are defined as nursing facilities providing skilled care, intermediate care, and/or intermediate care for mental retardation/developmental disabilities.*
> (1) Individuals who live in Title XIX LTCFs may qualify for medicaid. When the applicant/recipient is entering or is a resident of an LTCF, the need for medicaid assistance for the individual's cost of care must be determined. The individual must

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[1] There are certain instances in which a child's eligibility for Medicaid benefits depends upon the custody of the child remaining with a particular entity. Rule 5101:1-39-742 states in part:

> ADC-related medicaid coverage is extended to children who would be financially eligible for ADC cash assistance except they do not meet the definition of a dependent child.
> (A) Children who are placed in foster homes, private nonprofit child care institutions, or public child care institutions by a public child care agency are eligible for ADC-related medicaid if the eligibility requirements as outlined in Chapter 5101:1-39 of the Administrative Code are met. *The public child care agency must hold temporary or permanent custody of the child.*
> (B) Children who are placed in foster homes, private nonprofit child care institutions, or public child care institutions by a private nonprofit child care agency are eligible for ADC-related medicaid if the eligibility requirements as outlined in Chapter 5101:2-39 of the Administrative Code are met. *The private nonprofit child care agency must hold temporary or permanent custody of the child.*

12 Ohio Admin. Code 5101:1-39-742 (emphasis added). In such circumstances, a change in the temporary custody of a child could affect the child's eligibility for Medicaid coverage. These provisions, however, relate to children who are placed in foster homes, private nonprofit child care institutions, or public child care institutions. They do not apply to a child who resides in a long term care facility. Thus, these provisions do not appear to be applicable to your question. *See, e.g.,* 12 Ohio Admin. Code 5101:1-39-04, 5101:1-39-751.

> be in need of a specific level of care in addition to the limiting physical factor requirement. Level of care refers to the determination by ODHS that the individual is in need of certain specified services (i.e., skilled, intermediate). If the level of care certifies the individual's LTCF need, it is assumed that the requirement of limiting physical factor is met. If limiting physical factor is not met by a certified level of care, and no limiting physical factor decision has been met otherwise (e.g., receipt of SSI), there must be a separate determination of limiting physical factor by the disability determination unit for medicaid eligibility as stated in rule 5101:1-39-032 of the Administrative Code.
> (2) LTCF level of care certification includes skilled (SNF), intermediate (ICF), and intermediate care for the mentally retarded/developmentally disabled (ICF-MR/DD).

12 Ohio Admin. Code 5101:1-39-04(D) (emphasis added). Thus, residence in an LTCF is consistent with Ohio Medicaid eligibility.

Rule 5101:1-39-54 states that "Medicaid eligibility can be extended only to those individuals who are determined to be residents of Ohio." 12 Ohio Admin. Code 5101:1-39-54(A). An individual is considered to be an Ohio resident if the person "is living in Ohio at the time of application and is not receiving assistance in another state." 12 Ohio Admin. Code 5101:1-39-54(B)(1). "Individuals residing in institutions in Ohio are considered to be living in Ohio and, therefore, are Ohio residents," unless they are from outside Ohio and their institutional placement was arranged by an agency of another state. 12 Ohio Admin. Code 5101:1-39-54(B)(1), (C). "An _institution_ is an establishment which provides food, shelter and some treatment or services." 12 Ohio Admin. 5101:1-39-04(G). It is clear that an LTCF is an institution under 12 Ohio Admin. Code Chapter 5101:1-39. *See* 12 Ohio Admin. Code 5101:1-39-04(D), 5101:1-39-22(D). Thus, a child who is an Ohio resident and who continues to reside in an LTCF in Ohio retains the status of a resident of Ohio even if the temporary custody of the child is transferred to a person who resides outside Ohio.[2]

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[2] The residence of a legal guardian may be relevant to the determination of an individual's residence in certain circumstances. Rule 5101:1-39-54(B)(5) states that an individual is an Ohio resident if: "The legal guardian has been appointed, parental rights have been terminated, and the legal guardian is a resident of the state of Ohio. *In these situations, the guardian's state of residency is used."* 12 Ohio Admin. Code 5101:1-39-54(B)(5) (emphasis added). This provision, however,

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does not apply to a situation in which parental rights have not been terminated and does not appear to be applicable to the situation you have described.

Provisions governing the financial eligibility of a child who resides in an institution appear in rule 5101:1-39-22, as follows:

> (B) Institutionalized children.
> (1) For the month in which a child enters the institution, the child is considered living with the family. The income and resources of the parent(s) is considered available to the child in the month of institutionalization.
> (2) *The month following the month of institutionalization,* the child is treated as an individual living alone. *The child's own income and resources and any contributed income and resources is considered* in the eligibility determination.

12 Ohio Admin. Code 5101:1-39-22 (emphasis added). Thus, following the first month of institutionalization, a child's financial eligibility for Ohio Medicaid is determined on the basis of the child's own income and resources and any contributed income and resources. *See also* 12 Ohio Admin. Code 5101:1-39-05(C)(4) ("[r]esources of parents are not considered available to a child who is institutionalized when the institutionalization is not temporary even if the child returns to the home for periodic visits"). *See generally* 12 Ohio Admin. Code 5101:1-39-748 (eligibility determination for ADC-related Medicaid coverage cannot include consideration of income deemed from the grandparent to the grandchild under 12 Ohio Admin. Code 5101:1-23-042, which relates to the determination of ADC benefits when there is a minor caretaker). Therefore, a change in the temporary custody of an institutionalized child does not affect the determination of financial eligibility of the child except to the extent that the income or resources of the custodian are "contributed" for purposes of rule 5101:1-39-22.

Existing provisions of law thus indicate that a change in the temporary custody of a child who resides in a long term care facility in Ohio will not, in itself, affect the child's eligibility for Medicaid benefits under the Ohio medical assistance program. The fact that temporary custody is transferred to a relative who lives outside the state does not appear to change this result.

Conclusion

For the reasons discussed above, it is my opinion and you are advised:

1. If the temporary custody of a child who resides in a long term care facility in Ohio is transferred from a county department of human services to the child's grandparent who resides in another state, the county department of human services of the county in which the child lives is responsible for determining whether the child continues to be eligible for Ohio Medicaid benefits.

2. In determining whether Ohio Medicaid eligibility continues to exist in changed circumstances, the county department of human services should examine and apply relevant provisions of law, including 12 Ohio Admin. Code 5101:1-39-04(D), 5101:1-39-22(B), and 5101:1-39-54(B)(1), which indicate that the transfer of temporary custody of a child who resides in a long term care facility in Ohio from a county department of human services to the child's grandparent who resides in another state will not, in itself, render the child ineligible for Medicaid benefits under the Ohio medical assistance program.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 28, 1995

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
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Lisbon, Ohio 44432

SYLLABUS: 95-002

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