

Elder Law and Special Needs Section

Memorandum Regarding Immediate Need for Personal Care Services and Consumer Directed Personal Assistance I.D. HLT-43-15-00003-P

To: Katherine Ceroalo
Department of Health
Bureau of House Counsel
Regulatory Affairs Unit

Elder # 14

December 8, 2015

Re: HLT-43-15-00003-P

The Elder Law and Special Needs Section of the New York State Bar Association is submitting the following commentary regarding the Department's proposed regulations which provide for Immediate Need for Personal Care Services and Consumer Directed Personal Assistance (I.D. HLT-43-15-00003-P). We commend the Department for a meaningful effort to address the Court's order in *Konstantinov v. Daines* and to implement §366-(a) 12 as added by Chapter 57 of the Laws of 2015 regarding expedited Medicaid determinations for people with immediate needs. We are particularly pleased that the Department has decided to forgo the mandatory referral to protective services, which we strongly opposed. Our recommendations regarding these proposed regulations while relatively minor, are important to the Section and the clients we serve.

In 18 NYCRR § 505.14(b)(7)(i)(a)(2) and the corresponding section in 18 NYCRR §505.28 (k), immediate needs are documented by a physician's order stating that the applicant/recipient "needs assistance with toileting, transferring from bed to chair or wheelchair, turning or positioning in bed, walking, or feeding,....." Rather than limiting the scope of immediate needs by creating a new standard for the provision of care, we would recommend that the Department substitute that the physician's order need only state that the applicant/recipient requires Level II personal care services, as defined in § 505.14 (a)(6)(ii) of these regulations. Since Level II personal care services have been used as the scope of services for medically necessary care for many years, it bears little repeating that this is the definition which should apply here rather than a limited scope of services devised for this particular group of individuals. We see little justification for such limitation.

With respect to the required attestation proposed in 18 NYCRR § 505.14(b)(7)(i)(a)(3) and 18 NYCRR §505.28 (k), the Department is requiring a statement that no home care services agency is providing assistance. We would recommend removing or modifying this provision, since it is possible that a home care services agency has been continuously providing these services until the person's funds have been exhausted, at which point the application is made to Medicaid. It is in everyone's best interest to maintain a continuity of care and to keep any existing home care services agency in place until the case is determined. We would want to ensure that the agency can be assured of payment for a Medicaid-eligible and medically-needy individual. Since it is not clear that reimbursement under 18 NYCRR § 360-7.5 would be possible in these situations, we would favor a procedure that would allow for a home care services agency to be providing care pending the Department's social and medical assessments.

We also recommend that the proposed provisions 18 NYCRR § 505.14(b)(7)(iv) and 18 NYCRR §505.28 (l) setting a timeline of 12 days for the approval of services from the date of the Medicaid determination for persons with immediate needs who are applying be changed to 12 days from the date of receipt a a medical recommendation for personal care or CDPA services, the application, and the attestation. It does not seem that it would be difficult to undertake the social and nursing assessment at the same time as the Medicaid review is going on, as long as the proper documentation is provided. Since the determinations are being made separately by services and non-services staff in the districts, it should be possible for both the application review and the social and medical assessment to take place at the same time, rather than to add days to this process for a person in critical need.

Finally, we concur with the New York Legal Assistance Group's comment that an expedited Fair Hearing process be provided for this group under 18 NYCRR §358-3.2(b)(9) by incorporating a reference in the regulation. For a frail and needy population, there are significant health and safety risks associated with any delay in the provision of services, so people in immediate need should have access to an expedited process for resolving disputes as would any person in need of emergency assistance.

Based on the foregoing, the Elder Law and Special Needs Section recommends that the Department to revise its proposed regulations in the following manner:

1. In every instance where a physician's order is required in the regulations, to delete the phrase "needs assistance with toileting, transferring from bed to, chair or wheelchair, turning or positioning in bed, walking, or feeding," and to replace it with "requires Level II personal care services, as defined in § 505.14 (a)(6)(ii) of these regulations."
2. In every instance where an attestation is required in the regulations, to delete the statement "no home care services agency is providing assistance to the recipient ...",

3. Amend 18 NYCRR § 505.14(b)(7)(iv) and 18 NYCRR §505.28 (l) to require that, for both applicants and recipients, approvals are made within 12 calendar days of receipt of a medical recommendation and attestation; and
4. Add a provision stating that persons applying for services under these regulatory provisions will receive priority in scheduling a Fair Hearing under 18 NYCRR §358-3.2(b)(9).

The person who prepared this memorandum: Deepankar Mukerji, Esq.
Section Chair: Julie Ann Calareso, Esq.