

Elder Law and Special Needs Section

Memorandum Regarding Immediate Needs for Personal Care Services I.D. HLT-28-14-0008-RP

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

Elder # 7

September 1, 2015

Re: HLT-28-14-0008-RP

The Elder Law and Special Needs Section of the New York State Bar Association offers the following comments with respect to the Department of Health's revised regulation which provides for determinations of Immediate Needs for Personal Care Services (I.D. HLT-28-14-0008-RP), which is now limited to Medicaid recipients only. As noted in the Regulatory Impact Statement, regulations concerning applicants with immediate needs will be addressed after further findings by Justice Madden in the *Konstantinov v. Daines* matter, so we are withholding comments regarding new applications until we have had an opportunity to review those regulations. In addition, the Regulatory Impact Statement states that regulations to implement Chapter 57 of the Laws of 2015 concerning expedited Medicaid determinations are forthcoming. We look forward to the promulgation of those implementing regulations.

With respect to the current proposed regulations, we are encouraged that the Department is addressing Justice Madden's order in *Konstantinov v. Daines*; however, we must register a serious objection to the current iteration of these provisions, which create an unnecessary and burdensome process for Medicaid recipients by requiring a Protective Services for Adults ("PSA") referral and acceptance of the case.

This regulation would repeal the existing 18 NYCRR § 505.14 (b)(5)(iv) which currently allows districts to authorize care for recipients based upon a physician's order and social assessment if a nursing assessment has not taken place within five (5) days. With the release of GIS MA 15/11 "reminding" districts of this provision, we would hope that districts are now developing procedures to authorize cases under this regulation, since care has more often been completely unavailable until MLTC enrollment has occurred.

Under the proposed replacement to 18 NYCRR § 505.14 (b)(5)(iv), the physician's order must specify hours of service required and document the immediate needs. The District has three (3) business days to make a determination. The Elder Law and Special Needs Section has no objection in concept to either of these provisions. Our chief concern is the provision to require that an applicant for immediate needs personal care services be either active as a Protective Services for Adults ("PSA") case or be accepted by PSA staff for investigation and assessment. As we have previously noted, PSA will not take a case where there are family members available, an agent under a durable Power of Attorney, or a court-appointed guardian (as stated in the regulations, individuals are only eligible for PSA services if they "...have no one available who is willing and able to assist them responsibly." 18 NYCRR § 457.1(c)). This proposed provision therefore precludes a significant needy population from receiving potentially life-saving services.

There is also no guidance in the regulation as to what, in fact, PSA is assessing. In fact, it would appear that this requirement simply allows Districts to either deny the case or delay it interminably while a pointless PSA investigation is being conducted. Furthermore, PSA is not able or equipped to determine medical needs, so the Elder Law and Special Needs Section questions the purpose of inserting this requirement. All determinations pertaining to medical need are already addressed through nursing assessments and medical director reviews, so PSA has no place in this process. We do not believe that this superfluous bureaucracy is the intent of the *Konstantinov v. Daines* order or the New York State Constitution

As stated in our previous communication, we are further recommending that the proposed language in 18 NYCRR §360-3.7 (f)(2)(c) which requires that a physician's order "documents whether the Medicaid applicant has a stable medical condition, as defined in subdivision (a) of Section 505.14 of this Title and can be cared for at home" be changed to: " documents that it is reasonably expected that the individual's health and safety can be maintained in the home." The proposed language appears more stringent and applies a higher standard than 18 NYCRR § 505.14 (a)(4), which states that "[p]ersonal care services, as defined in this section, can be provided only if the services are medically necessary and the social services district reasonably expects that the patient's health and safety in the home can be maintained by the provision of such services, as determined in accordance with the regulations of the Department of Health." We respectfully request that the Department not create a new standard for receiving Personal Care or CDPAP services, since we believe the existing standards are adequate.

We urge the Department to consider a regulatory scheme that will responsibly provide immediate needs personal care services without unnecessary barriers. The aspects of this regulation that we are concerned about appear to unfairly burden Medicaid recipients who are elderly or disabled. Such disparate treatment would therefore violate the State Constitution and the Americans with Disabilities Act (ADA) as interpreted in *Olmstead*.

Based on the foregoing, the Elder Law and Special Needs Section urges the Department to revise the regulations to eliminate the requirement that the case be accepted by PSA, and to amend the proposed language in 18 NYCRR § 360-3.7 (f)(2)(c) to be consistent with the provision in 18 NYCRR § 505.14 (a)(4).

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