

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

February 11, 2015

Elder #2

S.2007; Part B – Sec. 35
A.3007; Part B – Sec. 35

By: BUDGET
By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE ELIMINATION OF TEMPORARY PERSONAL CARE SERVICES TO PEOPLE IN IMMEDIATE NEED

INTRODUCTION: In 2012, the Appellate Division, First Department, declared that the provision of emergency care to persons who are in immediate need of personal care services and are applying for Medicaid was required under the § 133 New York State Social Services Law (*Konstantinov v. Daines*, 101 A.D.3d 520, 956 N.Y.S.2d 38 [1st Dep't 2012]). The Court directed that the Department of Health promulgate regulations which create a process for Medicaid applicants to request immediate temporary personal care services and which provide for expedited assessments to determine the levels of service to be provided. However, the Executive is now looking to overturn the Court's ruling and to eliminate the ability of medically needy persons to access Medicaid-funded home care pending a determination of financial eligibility.

1. Elimination of Immediate Need provisions will created further delay and barriers to care in contravention of the New York Constitution: Persons applying for Medicaid home care face a daunting array of bureaucratic processes, including the review of their Medicaid application, which entails complete documentation of their finances and two separate nursing assessments before receiving any services. These processes can often take months to complete, and these medically fragile individuals, who by definition are also financially needy, cannot receive any covered services until the process is complete.

2. The Potential For Abuse Of Immediate Need Can Be Remedied Using Existing Laws: The State has the ability under § 104 of Social Services Law to bring recovery proceedings against applicants and recipients for incorrectly paid Medicaid, in those cases where Medicaid is authorized. Since the chief danger of abuse of the system is that individuals will have incorrectly stated their assets and ultimately have resources and income in excess of Medicaid standards, already-existing recovery powers conferred upon Social Services officials are adequate to safeguard the public fisc.

The Elder Law and Special Needs Section of the New York State Bar Association opposes the elimination of these immediate relief provisions.

ANALYSIS:

The proposed 2015-16 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part B § 35 would amend Social Services Law § 133 to provide that Medicaid, personal care, and home care are eliminated from consideration as emergency assistance and § 36 amends § 364-i to limit provision of Medicaid services in advance of an eligibility determination to a limited category of persons and instances. This legislation is in response to the Appellate Division's ruling in *Konstantinov v. Daines* (101 A.D.3d 520, 956 N.Y.S.2d 38 [1st Dep't 2012]). In that case, the Appellate Division found that, pursuant to New York Social Services Law, applicants for personal care services under Medicaid and who are in immediate need are entitled to temporary personal care services while their applications are pending. The State passed laws limiting a provision called presumptive eligibility, which allows certain hospitalized individuals to receive home health services prior to a determination of eligibility upon discharge, and claimed that the emergency assistance provisions of § 133 did not apply. This was rejected by the New York State Supreme Court in a subsequent order, which also found that temporary personal care services are required under the New York State Constitution (*Konstantinov v Daines*, 2014 NY Slip Op 30657(U), 2014 N.Y. Misc. LEXIS 1137 [N.Y. Sup. Ct. Mar. 12, 2014]).

The Executive would re-define the decades-old provisions of New York State Social Services Law § 133 and §364-i(7) so as to eliminate Medicaid services from the type of "public assistance" services that must be authorized while a Medicaid application is pending and where there is an immediate urgent need for assistance. In light of the new delays imposed by the MLTC system, the Governor's proposal to deny any immediate assistance to frail seniors and people with disabilities who are seeking Medicaid home care services to meet their most basic needs is problematic, bad public policy and violates the State Constitution and the Americans with Disabilities Act (ADA) as interpreted in *Olmstead*. Personal care services provide help getting out of bed, walking, going to the bathroom, or preparing meals for people who cannot perform these tasks because of severe disabilities. Lack of these services will certainly force people into nursing homes in violation of *Olmstead*. While §364-i of Social Services Law does authorize care to people being discharged from hospitals under the rubric of presumptive eligibility, since the advent of mandatory Managed Long Term Care (MLTC), presumptive eligibility has not been used, since home care services are now only provided after enrolment with a MLTC provider and such enrolment can only occur after Medicaid is authorized.

The State has not implemented the law and authorize Medicaid personal care services based on immediate need pending a Medicaid application. The Executive apparently intends for the proposed statutory amendments to render the *Konstantinov* lawsuit moot. However, the requirement to provide Medicaid services to applicants based on immediate need is based not only on state law but also on the Aid to the Needy clause in Article XVII of the New York State Constitution. Even if State reimbursement is not available

under the presumptive eligibility provision of § 364-i, the local districts must provide services under § 133 of Social Services Law. That Section of the law allows for needy people to receive cash grants prior to a full review of their finances. These provisions have long been used to prevent hunger and homelessness, and the *Konstantinov* court correctly included medical assistance as an emergency assistance need. By eliminating medical assistance and care from the emergency assistance provisions found in that law, the Executive now seeks to abrogate a constitutional obligation.

1. Elimination of Immediate Need provisions will create further delay and barriers to care in contravention of the New York Constitution: Medicaid applications for the aged and people with disabilities technically must be processed in 45 days -- but often take much longer. Even once approved, it may be months more until a frail senior starts receiving Medicaid home care services. While there has always been bureaucratic delay in authorizing Medicaid home care services, the shift to Managed Long Term Care (MLTC) has exacerbated this problem in initiating vital home care services. Now, more than ever, SSL 133 and related 364-I (7) must be preserved to initiate Medicaid personal care services for a frail senior during the many months before a Medicaid application is processed and an MLTC plan actually starts providing home care where there is an immediate need.

The delays in accessing home care through MLTC plans is an unintended result of the Medicaid Redesign Team (MRT) shift of delivery of long-term care services from the local departments of social services to MLTC plans. Enrollment in these plans can only begin on the first day of a month – this alone causes a full month delay to some unlucky individuals whose Medicaid applications are approved early in a particular month, but have to wait until the subsequent month to obtain care. Even worse, enrollment must be entered into the computer system by the 18th of the *prior* month, making the individual subject to the administrative processes of two agencies – the local Medicaid office and the MLTC provider. And that data entry cannot be done until the individual, though already found eligible for Medicaid, has been determined eligible for long-term care by a new Conflict Free Eligibility and Enrollment assessment, which takes another week or two to schedule. Thus someone found eligible for Medicaid 45 days after he or she applied may easily wait another 60 - 90 days until he or she is enrolled in an MLTC plan and home care services begin. And too often it takes even longer, with longer delays caused by complications resulting from yet other unintended consequences of the shift to MLTC, and which involve many complex computer systems and procedures.

2. The Potential For Abuse Of Immediate Need Can Be Remedied Using Existing Laws: The State has the ability under § 104 of Social Services Law to bring recovery proceedings against applicants and recipients for incorrectly paid Medicaid, in those cases where Medicaid is authorized. State agencies can impose liens and pursue judgment when public funds have been expended incorrectly. The recovery provisions contained in Social Services Law are intended to safeguard against fraud and abuse of the system and have long been considered sufficient for this purpose. The new provisions presume that the Medicaid applications are fraudulent at the outset and would create a

more stringent standard for the elderly and medically needy populations than for others seeking assistance.

While the Elder Law and Special Needs Section believes that the vast majority of cases where Medicaid is sought by elderly and infirm individuals are correctly approved, it is conceivable that, in some cases, individuals will have incorrectly stated their assets and ultimately have resources and income in excess of Medicaid standards. The provisions of § 104, however, have long been considered adequate as a remedy for such situations. In those limited situations where people are ineligible because of excess assets or income, a recovery make sense because there is a high likelihood that the State will be repaid.

Based on the foregoing, the Elder Law and Special Needs Section **OPPOSES** the proposed amendments to § 133 and § 364-i of New York Social Services Law.

Section Chair: Richard A. Weinblatt, Esq.