New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Comment on proposed revised regulation on Immediate Needs for Personal Care Services

I.D. No. HLT-28-14-00008-RP
(Proposed Action: Amendment of sections 360-3.7 and 505.14 of Title 18 NYCRR)

ELDER LAW AND SPECIAL NEEDS SECTION

Elder # 5 March 25, 2015

On behalf of the Elder Law and Special Needs Section of the New York State Bar Association, this is to voice our serious concerns about the Department's proposed regulations which provide for Immediate Needs for Personal Care Services (I.D. HLT-28-14-0008-RP). While we are encouraged that the Department is addressing the Court's order in *Konstantinov v. Daines*, the process being created by these regulations is problematic at best and could be subject to further constitutional challenge.

The Section's 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. 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 (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)). It is critical to note that none of these representatives for an ailing and destitute individual have any legal responsibility to finance the individual's care.

This provision therefore precludes a significant needy population from receiving potentially life-saving services. By conflating medical need with crisis prevention, an additional barrier to care has been placed in the path of aged and infirm New Yorkers. In fact, PSA cases are predicated on the fact that no one is available to assist a needy individual and that the individual is likely to suffer harm because they are unable to take care of themselves, while personal care regulations require that the patients be self-directing or have someone able to direct care, as defined in § 505.14(a) of the Department's regulations. This would seemingly create a catch-22, since persons who are eligible for personal care or CDPAP services by definition would not be appropriate for PSA referral.

Persons applying for Medicaid home care already 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. The dire need for expedited services was recognized by the *Konstantinov v. Daines* Court, which found that these services are in fact covered under Article 17 of the New York State Constitution. The proposed regulation instead adds a bureaucratic layer to the provision of services, namely a PSA evaluation. We do not believe that this is the intent of the *Konstantinov v. Daines* order or the New York State Constitution.

We also believe that the cost to the local districts, as estimated by the Revised Regulatory Impact Statement, is grossly overstated. The assumption that every individual applying for immediate needs personal care services will be determined to be a 24-hour, split shift case is simply a fabrication. Neither local districts nor the Managed Long Term Care providers have ever authorized more than a tiny fraction of cases for full 24-hour split shift care. This will not change simply because of the promulgation of these regulations, and the actual daily cost per case will be far less than $412 that is used for the cost estimate.

Moreover, local districts have the ability under § 104 of Social Services Law to bring recovery proceedings against applicants and recipients for benefits incorrectly paid in those cases where Medicaid is denied after review of the application. 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, local Commissioners may initiate actions under already-existing recovery powers with a high likelihood of success and such actions will therefore be cost-effective.

We are further recommending that the proposed language in §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 § 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 Agency not create a new standard for receiving Personal Care or CDPAP services, since we believe the existing standards are adequate.

In light of the bureaucratic delays built into the MLTC system, 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 frail seniors and people with disabilities who are seeking Medicaid home care services to meet their most basic needs. 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 § 360-3.7 (f)(2)(c) to be consistent with the provision in § 505.14 (a)(4).

Section Chair: Richard A. Weinblatt, Esq.