

Memorandum in Support

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER #1

February 24, 2021

S. 5028

By: Senator Rivera

A. 5367

By: M of A Gottfried

Senate Committee: Health

Assembly Committee: Health

Effective Date: Immediately

AN ACT to amend the social services law, in relation to removing certain restrictions on access to home care services; and to repeal certain provisions of such law relating thereto.

LAW & SECTION REFERRED TO: Section 365-a of the social services law.

A bill to remove certain restrictions on eligibility for Personal and Consumer-Directed Personal Care Program services under Medicaid, which were enacted in the FY 2020-21 Budget.

THE ELDER LAW AND SPECIAL NEEDS SECTION SUPPORTS THIS LEGISLATION

The Elder Law and Special Needs Section of the New York State Bar Association supports the repeal of the restrictions on Medicaid home care eligibility that were enacted last year. The restrictions illegally limit eligibility for Medicaid Personal Care and the Consumer-Directed Personal Assistance Program (CDPAP) services, and covertly shuts down the crucial preventative “housekeeping” home care program entirely. As these restrictions have not yet been implemented, the repeal will preserve the *status quo* for home care eligibility. In addition, would eliminate the huge cost of implementation of this massive change. The repeal is necessary to avoid violating Federal Law and unnecessary institutionalization.

1. The Minimum ADL Limit Unlawfully Denies Services Based on Diagnosis, Violating Medicaid Regulations and Jeopardizes State Funding Under the Community First Choice Option (CFCO)

The recently amended law, Soc. Serv. Law §§ 365-a(2)(e)(v) and 365-f, subd. 2(c) sets new minimum requirements for eligibility for PCS and CDPAP services, and for eligibility to enroll in a Managed Long Term Care (MLTC) plan. An applicant for PCS or CDPAP services, or an individual seeking to enroll in an MLTC plan, must need assistance with *physical maneuvering* for more than two Activities of Daily Living (ADL's). The sole exception is for those with Dementia or Alzheimer's disease, who must need *supervision* with more than one ADL. These new limits violate federal

regulations banning discrimination based on diagnosis and requirements of the Community First Choice Option (CFCO), thus jeopardizing New York's receipt of enhanced Federal Financial Participation for home care services.

The nature of vision impairments, Traumatic Brain Injury (TBI), Developmental Disabilities (DD), and other cognitive, neurological or psychiatric impairments, often require that the consumers with these impairments need *supervision* but *not physical maneuvering* with ADLs. These consumers would be denied PCS or CDPAP services solely because they are not diagnosed with Dementia or Alzheimer's disease, even though they have the same need for assistance. Denying eligibility solely based on diagnosis violates federal Medicaid regulations. See 42 C.F.R. §440.230(c). ("The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition").

NYS Department of Health responded to this argument by saying that people with TBIs or DD may access services through the TBI or OPWDD waivers, claiming that they need not rely on PCS or CDPAP services. PCS and CDPAP services, however, are services under the State Medicaid plan.¹ Under federal law, State Plan services must be available to every Medicaid recipient, including those who are in a waiver. TBI and OPWDD waiver participants do rely on "State Plan" services such as PCS and CDPAP for their core daily needs. The waivers supplement State plan services with special waiver services like Respite, Residential Habilitation, Day Habilitation, and Community Habilitation. However, these waiver services do not substitute for the essential daily care needs met by PCS or CDPAP.²

¹ See <https://www.medicaid.gov/medicaid/medicaid-state-plan-amendments/index.html>. The "comparability" rule requires State plan services to be available equally in amount, duration, and scope for all individuals within the eligibility group. 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. § 440.240(b). The denial of services because an individual has a different diagnosis, but the same needs as someone with dementia violates the comparability rule. *Oster v. Lightbourne*, 2012 WL 691833 (N.D. Cal. Mar. 2, 2012) (finding likely violation where use of functional ranks to determine eligibility for in-home services particularly disadvantaged people with cognitive disorders), earlier injunction sub nom. *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) (cuts to in home support services likely violate comparability requirement); *Parry v. Crawford*, 990 F. Supp. 1250 (D. Nev. 1998) (holding that comparability requirement prohibits the state from conditioning service on a particular diagnosis, if individuals have the same functional need).

² Participants in the OPWDD or TBI waivers have options for how they access State Plan PCS and CDPAP services. They may enroll in Medicaid managed care plans, or access PCS or CDPAP through their local district. The minimum ADL criteria would deny them PCS or CDPAP services. Presently they are excluded from enrolling in MLTC plans.

Additionally, New York has opted to offer CFCO services, which provides the State with an enhanced Federal match for home care services. The CFCO regulations also prohibit discrimination based on diagnosis. “States must provide Community First Choice to individuals ...[i]n a manner that provides such services and supports... *without regard to the individual's age, type or nature of disability*, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life.” 42 C.F.R. § 441.515 (emph. added). CFCO also requires States to provide assistance with ADLs and Instrumental ADLs (“IAD”) to a CFCO-eligible individual not only through hands-on assistance but also through supervision and cueing.³ Many applicants who have TBI or DD diagnoses qualify for CFCO because without home care services, they would require an institutional “level of care” – whether in a nursing home, psychiatric hospital, or Intermediate Care Facility for Developmental Disabilities (ICF-DD).⁴ If the law is not repealed, it would deny PCS or CDPAP services to individuals who needs supervision and cueing, even though said individuals are meeting the level of care criteria for CFCO. The law jeopardizes New York’s receipt of this important CFCO funding.

2. Repeal would restore the “Housekeeping” Program – a Crucial Preventive Service that Keeps Seniors and People with Disabilities Safe in Their Homes

Though the longstanding program that provides vital personal care services of up to eight hours per week for “individuals whose needs are limited to nutritional and environmental support functions” remains in the statute, SSL § 365-a, subd. 2(e)(iv), the FY 20-21 Budget indirectly abolished it. Also known as “Level 1” personal care or “housekeeping” services, the program provides crucial assistance for seniors and people with disabilities who can dress and bath themselves, but who, because of chronic impairments, cannot do laundry, shop, prepare meals, or clean their homes. These household tasks are “Instrumental ADLs” (IADLs) and not ADLs, and the need for help with these tasks does not count toward the new minimum requirement of 2 or 3 ADLs needed to qualify for personal care services. These individuals would be denied Medicaid home care services entirely, putting them at risk of falls or other accidents that could totally disable them. By investing in just 8 hours per week of this preventative service, Medicaid prevents

³ If an individual meets the CFCO level of care criteria, “...the State must provide ...[a]ssistance with ADLs, IADLs, and health-related tasks through hands-on assistance, supervision, and/or cueing.” 42 C.F.R. § 441.520(a). “IADLs” are tasks such as cleaning, shopping, meal preparation, formerly referenced in New York as nutritional and environmental support functions,” SSL § 365-a, subd. 2(e)(iv). These are commonly known in New York as “housekeeping” tasks or “Level 1” personal care tasks in the State regulation. 18 N.Y.C.R.R. 505.14(a)(5).

⁴ In the CFCO Technical Guide, CMS clarified, “CMS reminds states that all three ways of delivering assistance with ADLs, IADLs and health related tasks must be made available. States may not limit the scope of this benefit to offer less than all three.”

accidents that could land people in a hospital or nursing home, or cause them to need personal care services of as much as 24 hours/day – at much higher cost to the State.

The program is not costly for the State. In November 2020, only 601 New York City residents were receiving these services.⁵ Though the current users would be “grandfathered” in and may keep their services, new people apply for these services every month due to the rising need with the increasing aging population. The long wait-lists for the state-funded EISEP program are notorious, and the EISEP program would only be more burdened with elimination of this Medicaid program.

The FY 2020-21 Budget law eliminated this vital program, and but did not make clear that cancellation of this service would result from the new minimum ADL requirements. This is not an appropriate manner to eliminate a program that has maintained the health and safety of elders and people with disabilities in their homes for decades. Repeal of the FY 2020-21 Budget changes would ensure continuation of this important preventative service.

Based on the foregoing, the New York State Bar Association Elder Law and Special Needs Section **SUPPORTS** this legislation.

⁵ See HRA Facts, December 2020, at page 2, available at <https://www1.nyc.gov/site/hra/about/facts.page#caseloads>, with direct link at https://www1.nyc.gov/assets/hra/downloads/pdf/facts/hra_facts/2020/hra_facts_2020_12.pdf.