

Memorandum in Support

February 9, 2024

S. 328
A. 6346

By: Senator Rivera
By: M. of A. Paulin
Senate Committee: Advanced to Third Reading
Assembly Committee: Ways and Means
Effective Date: Immediately

THE ELDER LAW AND SPECIAL NEEDS SECTION SUPPORTS REPEALING ADDITIONAL ACTIVITY OF DAILY LIVING (ADL) REQUIREMENTS FOR PERSONAL CARE SERVICES

During the height of the pandemic, as a result of recommendations from the Medicaid Redesign Team II, the then-Executive pushed through as part of the 2020-2021 New York State Budget (Chapter Law 56, Part MM Sections 2- a and 3), amendments to NY SSL Sections 365-a and 365-f. These changes restricted eligibility for Medicaid personal care and consumer-directed personal assistance program (CDPAP) services in New York State to persons who require "limited assistance with physical maneuvering with more than two activities of daily living, or for persons with a dementia or Alzheimer's diagnosis, as needing at least supervision with more than one activity of daily living, provided that the provisions related to activities of daily living in this paragraph shall only apply to persons who initially seek eligibility for the program on or after October first, two thousand twenty." *S.328 (Rivera)/A.6346 (Paulin) repeals the additional activity of daily living (ADL) requirements for Personal Care Services. This repeal is critical to ensure that vulnerable persons who need assistance have access to crucial home care services that prevent accidents, deterioration in health conditions, and unnecessary hospitalization and institutionalization. This equal access to home care for all individuals in need of home care services is necessary to prevent discrimination based on disability in violation of the Americans with Disabilities Act and the federal Medicaid laws and regulations.*

New York State law does not explicitly define "activities of daily living" (ADL), but the Federal Center for Medicare & Medicaid Services (CMS) State Medicaid Manual defines ADLs to "include eating, bathing, dressing, toileting, transferring, and maintaining continence." The CMS State Medicaid Manual defines Instrumental Activities of Daily Living (IADLs) to "include personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management." In New York, IADLs are classified as "nutritional and environmental support functions" or maintaining "Level 1" or "housekeeping" tasks, as differentiated from "Level II" personal care tasks or ADLs. NY SSL Sections 365-a, subd. 2(e)(iv); 18 N.Y.C.R.R. § 505.14(a)(v).

In 2021, there were two key changes to the criteria for qualifying for Medicaid personal care or CDPAP— setting a minimum *number* of ADLs to qualify for any personal care or CDPAP assistance and requiring a minimum *level* of assistance with these ADLs to qualify for home care.

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The threshold number of ADLs and threshold level of assistance required is lower for people with dementia or Alzheimer's disease. In order to prevent illegal discrimination based on diagnoses, it is imperative to repeal the categorizations of people who qualify for services. For the first time, State law sets a minimum number of ADLs for which an individual must need assistance in order to qualify for *any* personal care or CDPAP services.

These numerical requirements represent an enormous restriction, as personal care and CDPAP services for many decades have been available to persons who needed *any* assistance with an ADL, with the amount of service dependent on individual need. Prior to enacting the MRT II proposal, even those who could independently perform ADLs, but who needed support with "nutritional and environmental support functions" (IADLs like shopping, cooking, cleaning, or doing laundry), were eligible for a maximum of eight hours per week of personal care services. NY SSL Sections 365-a, subd. 2(e)(iv).

Now, because of the ADL minimum requirement, eligibility for the limited eight hours of weekly IADL assistance has apparently been eliminated, thus depriving vulnerable persons of a vital preventative service that enabled them to stay in their homes and communities, and to avoid accidents, injury, deteriorated health conditions, and institutionalization.

In order for an ADL to be counted toward the minimum threshold number, an individual must need "at least limited assistance with physical maneuvering" with three ADLs, with the exception that a person with a dementia or Alzheimer's diagnosis must be "assessed as needing at least supervision with" two ADLs. NY SSL Sections 365-a, subd. 2(e)(v). Requiring "supervision" with two ADLs is not only a lower threshold than requiring "physical maneuvering" with three ADLs, it acknowledges the distinctive *type* of assistance specifically needed by people with cognitive impairments. In discussing the scope of personal care services, the CMS Medicaid Manual, *supra*, describes the cueing or supervisory assistance needed by people with cognitive impairments who may be physically capable of performing ADLs and IADLS.

Cognitive Impairments.--An individual may be physically capable of performing ADLs and IADLs but may have limitations in performing these activities because of a cognitive impairment. Personal care services may be required because a cognitive impairment prevents an individual from knowing when or how to carry out the task. For example, an individual may no longer be able to dress without someone to cue him or her on how to do so. In such cases, personal assistance may include cuing along with supervision to ensure that the individual performs the task properly. CMS Medicaid Manual, *supra*, n 1 at section 4480. The CMS Medicaid Manual specifically encompasses persons with "cognitive impairments." Clearly, people with diagnosis of dementia and Alzheimer's disease are among those who have "cognitive impairments." But there are others as well. The U.S. Center for Disease Control (CDC) states,

Cognitive impairment is not caused by any one disease or condition, nor is it limited to a specific age group. Alzheimer's disease and other dementias in addition to conditions such as stroke, traumatic brain injury, and developmental disabilities, can cause cognitive impairment. This repeal is necessary in order to eliminate the categories of diagnoses that qualify an individual for personal

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care. Otherwise, the restriction that allows only people diagnosed with Alzheimer's disease or dementia to qualify based on the need for supervisory assistance is discriminatory.

The minimum ADL requirements enacted as part of the 2020-2021 Budget appeared to be an attempt to align the Medicaid criteria for personal care with the U.S. Tax Code's definition of a qualified long term care insurance policy. See 26 U.S.C. § 7702B. However, the tax code expressly permits coverage for people who require assistance with two out of six ADLs, or who "[require] substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment." 26 U.S.C. § 7702B (c)(2)(A)(iii). Thus for people with a cognitive impairment, there is no minimum number of ADLs required to benefit from the tax benefits of a qualified long term care policy – provided that they need substantial supervision.

The Public Health Emergency and the American Rescue Plan Act ("ARPA") prohibited states from placing any new requirements or restrictions on the Medicaid program's home and community based services known as the "Maintenance of Effort". Therefore, this ADL restriction has never been implemented and by federal requirement, states cannot restrict eligibility until the earlier of when they spend the federal ARPA funds or March 31, 2025. Notwithstanding the then-Executive's assertions, no savings have been, or will be, achieved as a result of this onerous and discriminatory standard.

Based on the foregoing, the Elder Law and Special Needs Section **SUPPORTS S.328 (Rivera)/A.6346 (Paulin)**.