

Medicaid
Medicaid Matters New York
Matters

Memorandum in Support

A.5367-A, Gottfried / S.5028, Rivera

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

Repeal of Illegal Restrictions on Medicaid Home Care Eligibility Enacted in FY 20-21 Budget to Avoid Violating Federal Law and Unnecessary Institutionalization

Medicaid Matters New York, the statewide coalition representing the interests of people served by New York's Medicaid program, supports repeal of the restrictions on Medicaid home care eligibility enacted last year that arbitrarily and illegally limit eligibility for Medicaid personal care and consumer-directed personal assistance (CDPAP) services, and that covertly shuts down entirely the small but crucial preventative "housekeeping" home care program. Since these restrictions are not yet implemented, repeal will preserve the status quo for home care eligibility.

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 personal care and CDPAP services and for enrollment in a Managed Long Term Care (MLTC) plan. An applicant for personal care 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 (ADLs). The sole exception is for those with dementia or Alzheimer's disease, who require supervision with more than one ADL. These new limits violate requirements of the Community First Choice Option (CFCO), jeopardizing New York's receipt of millions of dollars of enhanced federal financial participation for Medicaid home care services. Because of the nature of vision impairments, traumatic brain injury (TBI), developmental disabilities (DD), and other cognitive, neurological or psychiatric impairments, consumers often need supervision but not physical maneuvering with ADLs. Denying them personal care or CDPAP solely because they are not diagnosed with dementia or Alzheimer's disease – even though they have the same need for assistance – violates the "comparability" requirement of federal Medicaid law that 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 also violates federal Medicaid regulations (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 wrongly claims that denying personal care or CDPAP to people with TBI or developmental disabilities does not hurt them because they may access services through the TBI or OPWDD waivers. Personal care and CDPAP services, however, are services under the State Medicaid plan. In fact, TBI and OPWDD waiver participants do rely on state plan services such as personal care and CDPAP for their core daily needs. Under federal law, state plan services must be available to every Medicaid recipient, including those who are in a waiver. The waivers

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supplement those 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.

Additionally, New York's enhanced federal match for Community First Choice Option (CFCO) services – over \$287 million in FY 2016 alone¹ – is jeopardized because 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.*” Also, CFCO requires states to provide assistance with ADLs and Instrumental ADLs (IADLs) to a CFCO-eligible individual not only through hands-on assistance but also through supervision and cueing. 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).

2. Repeal Would Restore the “Housekeeping” Program – a Cost-Effective Preventive Service

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 bathe themselves, but who, because of chronic impairments, cannot do laundry, shop, prepare meals, or clean their homes. Because these household tasks are Instrumental ADLs (IADLs) and not ADLs, they do not count toward the new minimum of two or three ADLs needed to qualify for personal care services. Therefore, these individuals would be denied Medicaid home care services entirely, putting them at risk of falls or other accidents. By investing in just eight hours per week of this preventative service, Medicaid prevents accidents, hospital stays and nursing home placement, or costly 24/7 home care– at much higher cost to the State.

The program is not costly. In November 2020, only 601 New York City residents were receiving these services.² Though the current users would be “grandfathered” in and may keep their services, new people apply for these services every month – a 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 surreptitiously; the Legislature was likely not aware that the new minimum ADL requirements would eliminate this service, especially since the provision authorizing this service remains in the statute. Repeal of the FY 20-21 changes would ensure continuation of this important preventative service.

For the above reasons, Medicaid Matters urges the provisions of this legislation be enacted.

¹ See Report of U.S. HHS Office of the Inspector General, Feb. 6, 2020, available at <https://oig.hhs.gov/oas/reports/region2/21701015.asp>

² See HRA Facts, December 2020, at page 2, available at <https://www1.nyc.gov/site/hra/about/facts.page#caseloads>.