

Memorandum in Opposition ELDER LAW AND SPECIAL NEEDS SECTION

February 14, 2019

Elder #4

S.1507; PART G, §§2-4

A.2007; PART G, §§2-4

By: BUDGET

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Senate Committee: Finance

Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE REPEAL AND REPLACEMENT OF THE “CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM”

The 2019-2020 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part G §§2-4 would repeal and replace the current Consumer Directed Personal Assistance Program under Social Services Law §365-f.

The Governor’s proposal would limit the number of Fiscal Intermediaries that can operate within the Consumer Directed Personal Assistance Program (“CDPAP” or “CDPA”). The Governor’s proposal would also change the payment method to Fiscal Intermediaries from being paid based on the number of hours a Fiscal Intermediary processes for a given member to paying the Fiscal Intermediary on a per member per month basis.

CDPAP remains an increasingly popular alternative to institutionalization and traditional agency home health care services. CDPAP allows chronically ill and/or physically disabled individuals receiving Medicaid home care services (or Community Medicaid) greater flexibility and freedom of choice in obtaining such services. Services can include any of the services provided by a personal care aide or home attendant, home health aide, or nurse. The person receiving such services, or a person acting on his or her behalf (such as the parent of a disabled or chronically ill child), assumes full responsibility for hiring, training, supervising, and managing the employment of the personal care aide or home attendant, home health aide, or nurse, as the case may be, and must arrange for back-up coverage when necessary, and keep payroll records and manage employer tax filings. The person receiving such services, or the person acting on his or her behalf, must be able and willing to make informed choices regarding the management of the services he or she receives.

A Fiscal Intermediary (“FI”) is crucial to the success of CDPAP because it is the FI that handles the administrative aspects of CDPAP cases, such as payroll, tax withholdings, tax filings, and worker compensation policies and filings. If the Governor’s proposal is enacted, the number of FIs allowed to operate will be significantly reduced. Moreover, if the payment scheme to FIs is changed as proposed, then there will be a number of FIs that will choose to leave CDPAP. Without the services of the FIs, many consumers enrolled in CDPAP will no longer be able to utilize CDPAP and will be forced into institutions or may perish as a result.

If a competent FI goes out of business or is not user-friendly because of the Governor’s proposal, especially upstate and in more rural areas where the home care worker shortage is most severe, then Community Medicaid recipients in these areas will be unable to receive the care they need and have been deemed eligible to receive.

Moreover, if the Governor’s proposal is enacted more than 70,000 disabled New Yorkers will either be forced into nursing facilities or die without the supports and services they need to live their lives. The sole justification for the Governor’s proposal is the misguided contention that there are too many FIs in New York to service the disability community. Not only is this simply not true, but it also ignores the vast degree of services FIs provide to the disability community.

Additionally, the language of the Governor’s proposed new CDPAP statute at subdivision 9 contains the following:

Notwithstanding any provision of this section or any other law to the contrary, the provisions pertaining to consumer directed personal assistance services and fiscal intermediaries pursuant to this section shall only be available if the commissioner of health determines that there is adequate Federal Financial Participation to fund such programs and/or entities.

The danger with this language is that the Commissioner of Health (currently and in the future) may conclude that Federal Financial Participation is not adequate and is therefore authorized to eliminate the entire CDPAP without legislative oversight.

The Elder Law and Special Needs Section of the New York State Bar Association opposes the repeal and replacement of the current Consumer Directed Personal Assistance Program under Social Services Law §365-f.

ANALYSIS

CDPAP is a boon to those needing Community Medicaid services, especially upstate and in rural communities where home care vendors or agencies are not as plentiful as in urban or suburban communities. And, CDPAP is a boon to the county because rather than the county assigning a home care vendor or agency that selects, trains, and schedules the aides, the person receiving such services, or a person acting on his or her behalf (such as the parent of a disabled or chronically ill child), performs all the functions usually done

by a vendor or home care agency. All counties and all mainstream Managed Care and Managed Long Term Care plans are required to have a CDPAP program.

New York State pioneered CDPAP, which serves as a model for self-directed care for the rest of the nation. As early as 1979, New York State saw the creation of many private health care plans that stressed advocacy and allowed enrollees to make their own decisions about home health care as opposed to insurance companies or government programs like Medicaid. In 1992, the New York State Department of Health took over these private home health care plans and created the Patient Managed Home Care Program, which was later renamed the “Consumer Directed Personal Assistance Program,” or “CDPAP”. CDPAP remains the only program initiated by New York State that was designed by and for the disability community.

1. CHANGING THE PAYMENT STRUCTURE TO FISCAL INTERMEDIARIES WILL RESULT IN A DRASTIC REDUCTION OF CRITICAL SUPPORT SERVICES PROVIDED BY FISCAL INTERMEDIARIES TO CDPAP ENROLLEES:

Similarly damaging to the continued success of CDPAP is the Governor’s proposal to pay FIs a monthly per person administrative fee rather than a fee based on the number of hours processed for each enrollee. This will force FIs to discontinue vital services that may push some consumers into nursing facilities. For example, some people have significant disabilities that require substantial support needs. The Governor’s proposal presumes that an FI performs the same volume and level of service for the person receiving 6 hours of services as they do for a person receiving 150 hours of services. This is a preposterous assumption that will lead to FIs drastically reducing the number of hours they are able to provide, thus forcing the termination of all but those consumers who require the least amount of assistance. The Governor’s proposal, if enacted, would effectively eliminate high hour cases by ensuring that consumers who need them will not find an agency that can afford to service them.

2. ELIMINATING THE NUMBER OF FISCAL INTERMEDIARIES FAILS TO APPRECIATE THE CRITICAL SUPPORT FISCAL INTERMEDIARIES PROVIDE TO CDPAP ENROLLEES:

The Governor’s proposal will result in the elimination of nine out of every ten agencies currently providing FI services and will impose an 80% cut on administrative reimbursements to surviving agencies. This in a program that already has some of the leanest administrative costs within Medicaid.

FIs are necessary and instrumental to the success of CDPAP. FIs are not merely payroll service companies. The consumer may be the ones that hire, train, supervise, and manage the employment of the aides, but it is the FI that manages the support services, such as wages, benefits, compliance with labor laws and worker compensation protections, tax filings, etc. The FI provides critical support to the consumer that they may not receive from traditional vendors or home care agencies. Consumers will often consult with their

FIs on a daily basis as the FI assists them in developing the skills needed to manage their enrollment in the program. These calls can take hours and routinely make the difference between a consumer remaining in the community through the successful use of CDPAP and being forced into an institution because they have no other options for their care.

The Governor's proposal also fails to recognize one of the most important benefits of CDPAP – when consumers control who they hire, they will hire someone who speaks their language and understands their culture. New York is a melting pot of spoken languages and ethnic backgrounds.

Dietary guidelines and other cultural norms are critically important to New Yorkers for religious and other reasons. An inability to speak the consumer's language and/or appreciate the consumer's religious customs and cultural norms are some of the largest problems wreaking havoc in the health care industry. These concerns are eliminated by the successful use of CDPAP.

3. THE GOVERNOR'S PROPOSED NEW LANGUAGE TO BE ADDED TO SOCIAL SERVICES LAW § 365-F WOULD GRANT UNPRECEDENTED, UNILATERAL, POWER TO A DEPARTMENTAL COMMISSIONER WITH NO REGARD TO LEGISLATIVE OVERSIGHT:

Our additional concern is over the following language of the Governor's proposal newly added to Social Services Law §365-f: "Notwithstanding any provision of this section or any other law to the contrary, the provisions pertaining to consumer directed personal assistance services and fiscal intermediaries pursuant to this section shall only be available if the commissioner of health determines that there is adequate Federal Financial Participation to fund such programs and/or entities." The danger with this language is that the Commissioner of Health (current and any future) may conclude that federal financial participation is not adequate and is therefore authorized to single-handedly eliminate the entire CDPAP without any oversight from the Legislature.

4. THE PROJECTED SAVINGS, EVEN IF ACCURATE, DOES NOT JUSTIFY THE CHAOS AND CONTINUITY OF CARE DISASTER THAT WOULD BE CREATED FOR CDPAP ENROLLEES IF THE GOVERNOR'S PROPOSAL IS ENACTED:

The Division of the Budget's projected savings for this proposal is \$75 million. We believe the estimates of these savings are, at best, dubious and, at worst, ignorant and dismissive of the chaos and continuity of care disaster that would be created for more than 70,000 New Yorkers currently enrolled in CDPAP if the Governor's proposal is enacted.

CONCLUSION

The elimination of FIs as a result of the Governor's proposal will force consumers and their families to make the critical decision whether they can continue to live at home and in their communities or whether they are forced into an institution because they no longer have access to the support and services through CDPAP.

If enacted, the Governor's plan would begin by putting hundreds of FIs, and thousands of their staff, out of operation as of January 1, 2020. Beginning as of that date, only three groups will be authorized to act as an FI: (a) Independent Living Centers, (b) organizations that have held continuous contracts with their local Departments of Social Services from no later than January 1, 2012, and (c) organization(s) that have a contract with the state as part of a mini-bid process with no guidelines regulating it. If the Governor's proposal is enacted, those consumers who remain enrolled in CDPAP will be forced to operate under a de facto monopoly that is only interested in serving those consumers that they can process quickly and for the least number of hours, thus resulting in a bare minimum of service.

The Governor's proposal, if enacted, will cause irreparable damage to CDPAP, a program that was founded in New York and has since served as a model for the rest of the nation for self-directed care. Moreover, the Governor's proposal, if enacted, would grant unprecedented, unilateral, power to a departmental commissioner with no regard to legislative oversight.

Based on the foregoing, the Elder Law and Special Needs Section OPPOSES this legislation.