

Memorandum in Opposition ELDER LAW AND SPECIAL NEEDS SECTION

Elder #10

May 12, 2020

OPPOSE ANY STATE ACTION THAT JEOPARDIZES INCREASED FMAP

Summary

In light of the current pandemic, the federal government is poised to increase the Federal match for Medicaid by 6.2%. As is described herein, the soon to be federal law also includes a maintenance of effort section which would prohibit any state seeking the increased support from imposing eligibility standards, methodologies, or procedures more restrictive than what was in effect as of January 1, 2020. In other words, New York State could be deemed ineligible for the enhanced FMAP if, as part of the 2020-2021 budget, the State makes any changes to the right of Spousal/Legally Responsible Relative Refusal; imposes a home and community based Medicaid eligibility Lookback Period; cuts the Spousal Impoverishment Resource Allowance; Gutting the CDPAP Program; Reforming the Fair Hearing Process or makes other changes to Medicaid eligibility rules, as is being discussed by the Medicaid Redesign Team II (“MRT II”). The Legislature must also reject these proposals because:

1. *Eliminating Spousal/Legally Responsible Relative Refusal*
 - a will encourage separation and divorce and force elderly spouses into nursing homes;
 - b is unnecessary because there are existing laws that can remedy any potential for abuse of spousal refusal;
 - c prevents necessary help for sick children and spouses who need Medicaid or the Medicare savings program for crucial medical care; and
 - d is protected by federal law when one spouse is institutionalized.

2. *Instituting a Home and Community Based Eligibility Lookback Period* will
 - a prevent needy elderly/disabled from accessing care and services – for months or even a year;
 - b wreak havoc on hospitals, causing overpopulation at a critical time when we cannot be adding burdens on our healthcare facilities;
 - c have an adverse impact on local DSS;
 - d result in the institutionalization of more people because they will not be able to afford to stay in their homes;
 - e violate *Olmstead*.

3. *Cutting the Spousal Impoverishment Resource Allowance* hurts New York’s neediest residents.

4. *Changes in Eligibility Criteria for Medicaid Home Care.*

a. Would require more than two activities of daily living (ADLs) for which consumer needs at least “limited assistance” up to the maximum of total dependence. This proposal is designed to DISQUALIFY people with Alzheimer’s disease and other cognitive impairments because it would not count an ADL for which the consumer needs “Supervisory” assistance, which is the prompting and cueing assistance typically needed by people with cognitive impairments. The “more than two ADL” proposal appears to be an attempt to align the Medicaid criteria 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). The MRT proposal would discriminate against people with cognitive impairments, violating Medicaid law and the ADA, and requiring MORE than two ADLs is stricter than any private long-term care policy.

b. Would eliminate “Level I” personal care, also known as “Housekeeping,” which is already limited to only 8 hours per week for those whose impairments make them unable to do their own laundry, clean, grocery shop, and cook. This service is a critical preventative service – keeping older people independent and accident-free by providing a critical support.

5. *Cutting CDPAP*

The Coronavirus crisis highlights the crucial role played by the Consumer Directed Personal Assistance Program in ensuring a supply of home care workers. With certain family members, neighbors, or fellow church members authorized to serve as personal assistants, they are more likely to be able to continue to work in a public health emergency. Long before this current crisis, there has been a dire shortage of aides, particularly outside of New York City. Without the CDPAP program there simply would be no aide coverage in many areas. Even in New York City, this program enables the consumer to have an aide who speaks their language, who cooks food from their culture, and who, in this crisis, shows up. Proposals to eliminate the requirement that plans and local districts inform consumers of the availability of this service, or to limit the number of Fiscal Intermediaries in a way that will limit access, should be rejected.

6. *Reforming the Fair Hearing Process*

“Reform the Fair Hearing Process” includes proposals that would limit the fair hearing review of decisions made by Managed Care agencies. Among the proposals were requiring fair hearing officers to defer in certain respects to determinations made by the managed care agencies. In the past the legislature has specifically protected the due process rights of Medicaid applicants and recipients even when the decisions under review were made by a non-governmental entity, just as if it were made by a governmental entity. See Social Services Law § 365-a(8). We urge the legislature to reject these proposals by the MRT and maintain these important due process rights.

Federal Restriction on Changes to Eligibility Rules

The federal emergency supplemental appropriations bill to address the COVID-19 pandemic, passed by the House of Representatives and expected to be acted on by the Senate imminently, includes provisions that authorize a temporary increase in the “Federal medical assistance percentage” for all states. However, the language appears to make a state ineligible for the increased federal funding if the state establishes any “eligibility standards methodologies, or procedures . . . [that] are more restrictive . . . [than what was] in effect on January 1, 2020.” See H.R. 6201, sec. 6008(b)(1). Although the federal language does not prohibit changes to Medicaid eligibility rules, a state that takes such actions will be denied access to these emergency enhanced funds. In the case of New York, if the proposed MRT II changes are passed and do not have a delayed effective date this could mean millions, if not billions, of dollars.

Other Reasons Why the Elder Law and Special Needs Section (“ELSNS”) of the New York State Bar Association (“NYSBA”) Opposes the Elimination of Spousal/Legally Responsible Relative Refusal for Community-Based Medicaid

1. WOULD ENCOURAGE SEPARATION AND DIVORCE, AND FORCE ELDERLY SPOUSES INTO NURSING HOMES

New York State has a constitutional mandate to provide care and support to needy individuals. The Americans with Disabilities Act mandates that disabled individuals have access to services in the least restrictive and most integrated setting. Though Federal and State programs have been expanded to enable the aged and infirm to stay in their homes and receive care, the elimination of the right of “spousal refusal” for persons living in the community would create barriers to the receipt of crucial medical care, force couples to consider divorce and separation, and force disabled people into unnecessary and premature institutionalization. The wholesale repeal of spousal refusal will encourage divorce and separation, and encourage institutionalization, since federal law still mandates availability of “spousal refusal” in nursing homes. 42 U.S.C. §1396r-5(c)(3).

2. EXISTING LAWS CAN REMEDY POTENTIAL FOR ABUSE

New York State law currently permits spousal refusal for both institutional care and care provided in the home. It also permits the commencement of both support and contribution proceedings against all refusing spouses. The State's ability to recover from the refusing spouse provides adequate safeguards against potential abuses while providing for case by case analysis and local agency flexibility. Rather than repealing spousal refusal, the State should use the laws already enacted to recover spousal support through negotiation and/or Court proceedings in circumstances where the spouse refuses to support despite the fact that he or she has more than sufficient resources and income to meet his or her own needs while at the same time contributing towards the support of his or her spouse.

3. NECESSARY FOR SICK CHILDREN AND SPOUSES WHO NEED MEDICAID OR THE MEDICARE SAVINGS PROGRAM

Because of the Affordable Care Act's expanded income limits – and absence of asset limits – for adults under 65 without Medicare, fewer married persons will need to use spousal refusal. But for seniors and people with disabilities on Medicare, the standard income and asset limits still apply, which are well below the federal poverty level. The Community Medicaid eligibility standards limit couples' resources to \$23,100 and income to \$1,284 per month. The reality of the high New York cost of living means that all the spouse's income and assets are necessary to meet the couple's living expenses, and prevent the spouse's own impoverishment and need for Medicaid.

4. PROTECTED BY FEDERAL LAW

Federal law guarantees the right of spousal refusal for spouses of nursing home residents. *See* 42 USC 1396r-5(c)(3). Elimination of this right for couples seeking to avoid institutionalization will lead to increased institutionalization at higher Medicaid costs. Moreover, the New York State legislature can not entertain a change to the allowance of spousal refusal for spouses of nursing home residents without a change to the federal law.

Other Reasons Why ELSNS of the NYSBA Opposes Any Imposition of a Lookback for Home and Community Based Waivered Services

1. DELAY ACCESS TO CARE AND SERVICES FOR MONTHS TO A YEAR

The procedures for applying for Medicaid *home care* are critically different than the procedures for applying for Medicaid for *nursing home* care. An individual may only apply for Medicaid for nursing home care if she is already in a nursing home. The fact that the Medicaid application remains unprocessed for an extended period of time while DSS reviews financial records will not prevent the applicant from promptly receiving appropriate care in the nursing home. In contrast, a lookback for community-based care would cause harmful delays for seniors and people with disabilities desperately in need of aide services to live safely at home. When a consumer applies for Medicaid to cover Managed Long Term Care or other home care, the applicant is not eligible to receive any Medicaid services until the application is approved. There are already delays in processing Medicaid applications for community-based care without a five-year lookback. If a lookback is added to the application process, approvals will likely take 6 months or more – notwithstanding a 45-day limit mandated by federal regulations. During that time the applicant receives no Medicaid services at all, and may have no ability to pay privately. The applicant would have to wait until the local DSS concludes its exhaustive review of five years of financial records before MLTC services can be provided. If this lookback was imposed, a senior/disabled applicant who meets the MLTC resource and income guidelines, and is thereby otherwise eligible for Medicaid, could have to go without needed services for as much as a year, while the application is pending.

2. WREAK HAVOC ON HOSPITALS, CAUSING OVERPOPULATION AT A CRITICAL TIME WHEN WE CANNOT BE ADDING BURDENS ON OUR HEALTHCARE FACILITIES

A lookback for community Medicaid will also negatively affect, and quickly overload, hospitals, stymying the ability to effectuate safe discharge plans. Consumers cannot receive care at home without a source of payment. Those individuals who are discharged without access to needed care at home, may suffer falls or other episodes that result in what could have been an avoidable re-hospitalization.

3. CAUSE LOCAL DSS BACKLOG

Creating a new lookback period would add a tremendous administrative burden to an already backlogged DSS. Federal regulations generally call for an application to be acted upon within 45 days of filing. As it stands now, DSS routinely takes months and months (approaching a year at times in some upstate counties) to decide an application. The State would also potentially run afoul of 42 USC 1396a(a)(8) requiring assistance to be provided with “reasonable promptness.”

4. WILL RESULT IN A HIGHER RATE OF INSTITUTIONALIZATION

The MRT proposal that the look back period rules for home care services would be the same as the rules for nursing homes in New York State. This would eliminate the use of pooled trusts to shelter assets and income in most home care cases. Given the cost of living around New York State, this as a practical matter would force many people who would not otherwise need institutional care into facilities because they will be unable to pay their rent, maintain their home etc. This is likely to cause greater expense to the State of New York in both the short and long term.

5. VIOLATES *OLMSTEAD*

In 1999, the U.S. Supreme Court held in *Olmstead v. L.C.* that states cannot discriminate against people with disabilities by offering them long-term care services only in institutions when they could be served in the community, given state resources and other citizens' long-term care needs (*Olmstead v. L.C.*, 527 U.S. 581 (1999)). The Court found that the federal Americans with Disabilities Act requires states to provide community- based treatment for persons with disabilities when the (1) state's treatment professionals determine that such placement is appropriate; (2) affected persons do not oppose such treatment; and (3) placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with disabilities. The Court suggested that states could demonstrate their compliance by creating a comprehensive, effectively working plan and having a waiting list for community services that moves at a reasonable pace. Although states are not required to change their policies and procedures, they may not, under *Olmstead*, reduce or make Medicaid eligibility for home and community services more restrictive than their existing program. This proposed change would clearly make New York's eligibility for home and community services

more restrictive than its existing program. Imposing a penalty period for home care services would restrict access to home care services in such a way as to violate the *Olmstead* mandate.

Other Reasons Why ELSNS of the NYSBA Opposes Cutting the Spousal Impoverishment Resource Allowance

The MRT proposes to reduce the spousal impoverishment resource allowance from \$74,820 to the lowest allowed by the federal government -- only \$25,728. With its high cost of living, New York should use the highest federal option (\$128,640) rather than the lowest. When New York set the resource allowance in 1995, New York elected the highest federally allowed resource allowance at the time -- which was then \$74,820 – but never enacted the federal cost-of-living index. In the last 25 years, while the federal ceiling has increased to \$128,640, New York’s allowance has stayed flat at \$74,820. The MRT proposal hurts those with the least resources – with life savings under \$74,820 (Couples A – D in table), while not affecting at all those with higher resources (couples E-G).

Couple	Spouse’s assets	Amount Community Spouse May Keep		
		In CA, MASS etc. (federal maximum)	Under Current NY Law	Under PROPOSED CHANGE
A	\$30,000	\$30,000	\$30,000	\$25,728
B	\$47,000	\$47,000	\$47,000	\$25,728
C	\$75,000	\$75,000	\$74,820	\$37,500
D	\$123,600	\$128,640	\$74,820	\$61,800
E	\$150,000	\$128,640	\$75,000	\$75,000
F	\$257,280	\$128,640	\$128,640	\$128,640
G	\$350,000	\$128,640	\$128,640	\$123,640

Impoverishing “well” spouses of nursing home residents or MLTC members will put the “well” spouses at risk of losing their homes, and force them onto Medicaid as they seek savings and subsidies wherever they can get them just to stay financially whole.

For all of these reasons, the ELSNS urges the Legislature to reject any effort to eliminate spousal/legally responsible relative refusal; impose a Home and Community Based Medicaid eligibility lookback period; cut the Spousal Impoverishment Resource Allowance; or other changes to Medicaid eligibility rules.