

Memorandum in Support

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER #13

June 23, 2020

S. 8403

By: Senator Rivera

A. 10486

By: M of A Gottfried

Senate Committee: Health

Assembly Committee: Health

Effective Date: October 1, 2020

AN ACT to amend the social services law, in relation to eligibility for medical assistance for personal care services for persons with traumatic brain injury, cognitive impairments, developmental disabilities, blindness, or visual impairment.

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

THE ELDER LAW AND SPECIAL NEEDS SECTION SUPPORTS THIS LEGISLATION

The New York State Bar Association Elder Law and Special Needs Section strongly supports A.10486/S.8403 to ensure that vulnerable persons whose need for assistance arises from cognitive or visual impairments have access to crucial home care services that prevent accidents, deterioration in health conditions, and unnecessary hospitalization and institutionalization.

Earlier this year, as part of the 2020-2021 enacted budget (Chapter Law 56, Part MM Sections 2-a and 3), the State amended Social Services Law Sections 365-a and 365-f to restrict 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" (ADLs),¹ or for individuals with a dementia or Alzheimer's diagnosis, assessed as needing at least

¹ The federal Center for Medicare & Medicaid Services (CMS) State Medicaid Manual, in its description of the "personal care services" benefit, defines ADLs to "include eating, bathing, dressing, toileting, transferring, and maintaining continence, and 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." CMS State Medicaid Manual, Chapter 4, section 4480, available at <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927>. In New York, IADLs are classified as "nutritional and environmental support functions" or "Level I" or "housekeeping" tasks, as differentiated from "Level II" personal care tasks or ADLs. NY SSL Sections 365-a(2)(e)(iv); 18 N.Y.C.R.R. § 505.14(a)(v).

supervision with more than one activity of daily living.” This amended law includes two key changes by:

1. Setting a minimum *number* of ADLs to qualify for personal care or CDPAP assistance; and
2. Requiring a minimum *level* of assistance with these ADLs to qualify for home care.

The recently enacted amendments to the Social Services Law establish threshold number of ADLs and threshold level of assistance required for people with dementia or Alzheimer’s disease. This created, however, an arbitrary and discriminatory standard related to diagnoses. This is the first time in New York that state law will prevent an individual from accessing *any* personal care or CDPAP services, unless the individual meets a minimum number of ADLs. The new law sets a three-ADL minimum for people with physical impairments, and a two-ADL minimum for people with a dementia or Alzheimer’s diagnosis. These new numerical requirements alone represent an enormous restriction and vast departure from historical New York policy; for many decades personal care and CDPAP services have been available to persons who needed *any* assistance with an ADL, with the amount of service afforded dependent on individual need. For example, historically, limited assistance of eight hours of home care per week would be made available for people who could independently perform ADLs, but who need support with “nutritional and environmental support functions” (IADLs like shopping, cooking, cleaning, or doing laundry). NY SSL Sections 365-a(2)(e)(iv).

The enacted budget also provides that 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. In contrast, 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(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. This is more consistent with the standard described the CMS Medicaid Manual, *supra*, pertaining to the cueing and 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 cueing along with supervision to ensure that the individual performs the task properly.

CMS Medicaid Manual, *supra*, n 1 at section 4480. This provision in the CMS Medicaid Manual specifically encompasses all persons with “cognitive impairments,” which clearly include other diagnoses in addition to dementia and Alzheimer’s disease. The U.S. Center for Disease Control (CDC) states, “[c]ognitive 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.²”

The enacted budget provision appears to have been 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. If that is the case, there was a failure to capture a major distinction in the federal law. Under the tax code, one is qualified for long term care without *any* minimum number of ADLs if the individual “[requires] 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). Otherwise, two ADLs are required. The New York statute is far stricter, requiring two ADLs *even* for people with cognitive impairments.

To ameliorate the potential harm of this restriction, A.10486/S.8403 clarifies that the need for cueing or supervisory assistance with two ADLs is sufficient to qualify an individual who has a cognitive or visual impairment for personal care or CDPAP services. Without this legislation, the new Social Service Law provisions would be imposing a discriminatory standard in violation with federal law and regulation, by only allowing people diagnosed with Alzheimer’s disease or dementia to qualify based on the need for supervisory assistance.³ This legislation rightly includes persons with traumatic brain injury, developmental disability, cognitive impairments, blindness or visual impairment in the same category as those suffering from Alzheimer’s for purposes of providing personal care or CDPAP services.

For all of the foregoing reasons we support S.8403 (Rivera)/A.10486 (Gottfried), and we urge members of the New York State Legislature to pass these bills and send them to the Governor for signature without delay.

² U. S. Center for Disease Control *Cognitive impairment: A Call for action, Now!*, (2011), at page 2, available at https://www.cdc.gov/aging/pdf/cognitive_impairment/cogimp_poilicy_final.pdf

³ “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.” 42 C.F.R. §440.230(c).