

Mr. Wayne Turnage, Director
Department of Health Care Finance
899 N. Capitol St. NE, 6th Floor
Washington, DC 20002

Re: Emergency and Proposed Regulations Governing Medicaid Reimbursement for Personal Care Aide Services, DCMR Chap. 50, Title 29.

Dear Mr. Turnage:

The Legal Aid Society of the District of Columbia writes today to oppose the proposed regulation that would reduce the allowable hours of personal care aid (PCA) services that the District's Medicaid agency would authorize. We appreciate this opportunity to submit these comments and look forward to working with you to continue DHCF's efforts to strengthen the District's Medical Assistance programs.

Legal Aid is the District's largest and oldest not-for-profit legal services organization. Legal Aid represents low-income District residents in a variety of legal matters, including public benefits matters such as Medicaid, Alliance, and DC Health Families. Virtually all of Legal Aid's clients qualify for one of the District's health care assistance programs.

We thank you for the opportunity to submit these comments in response to the reduction in personal care aide (PCA) services proposed in the DC register. The proposal would reduce the number of PCA service hours a Medicaid enrollee may receive annually from 1,040 hours to 520 hours. The proposal also does not include a medical necessity exception to the 520 hour limit, meaning that the limit is a firm cap. Through conversations with current and former staff at DHCF, we understand that individuals who require more than 520 hours of care would be encouraged to apply for more intensive care through either the Medicaid waiver for the elderly and individuals with physical disabilities (EPD waiver), or the waiver for individuals with developmental disabilities (DD waiver).

Legal Aid opposes this proposal because the District's waiver programs are not an appropriate alternative for many recipients of personal care services. As discussed below, many individuals who receive personal care aid will not qualify for the waiver because they do not require a sufficiently high level of care. Moreover, the District's waiver programs require a lengthy application process, and likely do not have the capacity to absorb everyone who would be affected by the limit on PCA services. Therefore, implementation of this proposed regulation could result in time periods when individuals have exhausted their limit of allowable PCA services but would not be able to receive care through a waiver – because they have a pending application or have been placed on a waitlist. Others who reach the 520 hour limit may be left without any assistance because the proposed regulation does not allow for additional person care

hours, even if an enrollee's treating physician determines that personal care assistance continues to be medically necessary.

Because not everyone will be able to transition to waiver coverage, the reduction will likely force some individuals who currently receive PCA services in the community to move to an ICF or nursing home. Additionally, the increased applications to the waiver program from individuals currently receiving PCA services will further delay those already in institutions from returning to the community through placement in the waiver. As noted in more detail by University Legal Services, the District is required by Title II of the Americans with Disabilities Act (ADA), and the Supreme Court's decision in *Olmstead*¹ to transition Medicaid enrollees in nursing homes to home and community-based care when appropriate.

The Medicaid Act further requires the District to apply reasonable standards when determining the extent of services due to an enrollee. *See* 42 U.S.C. 1396a(a)(17); *see also* 42 C.F.R. 440.230(b). Yet the proposed rule seeks to terminate all PCA services beyond 520 hours regardless of the beneficiaries needs. By implementing the proposed rule without the changes necessary to ensure continuity of the proper level-of-care for all enrollees, the District is likely opening the door to litigation under the ADA and the Medicaid Act.

Additionally, DHCF has previously stated that a primary purpose behind the proposed change is to combat fraud and abuse in the delivery of PCA services. Yet it is unclear how the proposed cap on services will fundamentally address the root causes of these concerns. Legal Aid understands DHCF's interest in preventing fraud and abuse in the delivery of PCA services, but efforts to address these concerns must not be so arbitrary as to broadly deny care to those individuals who depend on PCA services to meet their medical needs. Legal Aid is happy to continue working with DHCF and other advocates to develop standards that ensure proper delivery of care to those who need, it while avoiding unnecessary care and fraud at the same time.

For these reasons, Legal Aid opposes the proposed regulation to reduce the number of personal care hours to 520 per year, and the elimination of an enrollee's right to additional personal care services when medically necessary. Yet if DHCF chooses to move forward with this policy, Legal Aid recommends the changes below in order to ensure proper continuity of care for this vulnerable population.

- I. The proposed rule must be amended to allow for more than 520 hours of care when medically necessary, or when an individual has a pending application with one of the District's waiver programs, or has been waitlisted for placement in a waiver.**

¹ *Olmstead v. L.C. and E.W.*, 527 U.S. 581, *22 (1999) (stating that the ADA requires States to provide care in the community which community-based care is appropriate for the individual and can be reasonably accommodated).

Legal Aid is concerned about this proposal to shift current PCA recipients to waiver coverage for three main reasons.

First, applying for care through one of the District's waiver programs is a multi-step and often time-consuming process, requiring an application, medical evaluation, level-of-needs assessment, among other steps. Moreover, as more people apply for the waiver service due to the 520 hour cap, the application process will likely be slowed even further. An individual who requires personal care assistance for the maximum allowable 8 hours per day will exhaust the 520 allowable hours in 65 days. In some cases, 65 days will not provide sufficient time for a waiver application to be completed and approved. Without access to additional hours of care during the application process, such individuals will be left with no assistance unless and until their waiver application is approved.

Second, there are likely not enough additional waiver slots to accommodate everyone receiving PCA services. Should it become necessary to impose a waiting list for waiver slots, this will cause further delay for applicants to the waiver program. If an applicant is placed on a wait list, he or she will face a difficult choice after reaching the 520 hour limit on PCA services; he or she will either have to remain in the community without the care he or she needs or enter an intermediate-care facility or nursing home. Both of these options could harm beneficiaries and create additional costs for the District.

Finally, many individuals who currently receive PCA services may not qualify for the waiver – regardless of the available slots in the waivers – because they do not require a skilled level of care. “Skilled care,” also called “nursing home level of care,” means an individual requires extensive assistance or total dependence in multiple activities of daily living or instrumental activities of daily living. PCA services frequently involve a lower level of care than skilled (i.e. nursing) care, such as assistance with bathing, dressing, cooking, and other chores. Individuals who require more than 520 hours of PCA assistance, but who do not require nursing-level care, will have no access to the care they need once they reach the limit of PCA hours because they will not qualify for waiver services. For instance, individuals with certain developmental disabilities such as autism, individuals with traumatic brain injuries, certain mental illnesses, and senior citizens all may require more than 520 hours of PCA services each year, even though they do not need the nursing home level-of-care required for EPD or DD waiver eligibility. The proposed reduction, therefore, will reduce care to these vulnerable groups while providing no access to alternative assistance.

Referring enrollees to the District's Medicaid waiver programs, therefore, does not ensure that PCA service recipients will continue to receive the appropriate care after they exhaust their 520 hour limit. For these reasons, the proposed regulations must be amended to include an exception based on medical necessity to the annual 520 hour limit. Additionally, the 520 hour limit must not be applied to individuals who have a pending application with a waiver program, or who have been waitlisted for waiver coverage.

Legal Aid recommends the following changes:

1. As noted, Legal Aid is opposed to the proposed regulatory change in its entirety. If, however, DHCF goes forward with implementing the change, then there must be an exception to the 520 hour limit for individuals whose medical needs require additional PCA services.

Suggested Change: Amend 5009.2 to read as follows:

“Reimbursement for personal care services shall not exceed eight (8) hours of service per day per beneficiary. Reimbursement for services shall not exceed five hundred and twenty (520) hours during a calendar year, **unless additional hours are determined to be medically necessary by the recipient’s treating physician.**”

2. As noted above, the process of applying for and being approved for waiver coverage can be long, and the increased number of applications could lead to the creation of waitlists. DHCF should not terminate PCA services for individuals with pending waiver applications, or for individuals who are on a waitlist for a waiver slot, simply because they have reached the annual limit of allowable PCA hours.

Suggested Change: Add section 5009.6 that shall read as follows:

“PCA services will not be limited to 520 hours annually, as described in Section 5009.2, for individuals who have applied for coverage through one of the District’s Medicaid waiver programs but have not received an approval or denial notice, or for any individuals who have been approved for coverage through one of the District’s Medicaid waivers but who have been placed on a waitlist.”

II. The proposed regulation contains no requirement around enrollee notices of termination of personal care services.

The proposed regulation does not contain any additional notices to enrollees beyond that which is required from the personal care services provider. *See* CDCR 29-5008.3(k)(4). Many individuals are likely to be confused by the reduction in care, and others may wish to challenge whether they have actually used their full 520 hours of care.

Legal Aid suggests that DCHF develop a notice to be sent to all personal care service recipients before they reach the 520 hour limit that includes the following language:

“According to our records, you have received 520 hours of personal care services from [DATE] through [DATE]. Pursuant to [REGULATION], you are not entitled to any additional hours of care. In order to continue receiving in-home

care, you may apply for coverage through one of the District's home and community-based waiver programs.

If you wish to appeal this action, you can submit a written request for a fair hearing to either the Department of Health Care Finance at [ADDRESS & FAX NO.] or the Office of Administrative Hearings at [ADDRESS & FAX NO.]. You may also orally request a fair hearing by calling the Department of Health Care Finance at [DHCF PHONE NUMBER] or the Office of Administrative Hearings at [OAH PHONE NUMBER].

Additionally, if you have questions about filing an appeal, or if you wish to know more about the District's waiver programs or submit an application for enrollment in a waiver, please contact the District of Columbia's Health Care Ombudsman's office at [NUMBER FOR MAUDE HOLT IN OMBUDSMAN'S OFFICE].

III. Conclusion

Legal Aid appreciates the opportunity to submit these comments in opposition to the proposed rule. If DHCF plans to go forward with the proposal, then we would request the opportunity for advocates to meet with representatives of DHCF to further discuss the proposed rule, and the suggestions for improvement.

Please do not hesitate to contact Andrew Patterson (apatterson@legalaiddc.org) if we can be of further assistance.

Sincerely,



Andrew Patterson
Staff Attorney

CC:

M. Diane Fields