



Legal Aid Society
OF THE DISTRICT OF COLUMBIA

MAKING JUSTICE REAL

June 8, 2016

VIA FIRST CLASS MAIL AND EMAIL

Ieisha Gray
Director, Long Term Care Administration
D.C. Department of Health Care Finance
441 Fourth Street NW, 10th Floor South
Washington, DC 20001
dhcpubliccomments@dc.gov

Re: Comments on Proposed Amendments in the Renewal Application: Home and Community-Based Waiver for the Elderly and Persons with Physical Disabilities

Dear Ms. Gray:

I write on behalf of the Legal Aid Society of the District of Columbia to provide written comments on the proposed renewal application for the District of Columbia Medicaid program's Home and Community-Based Services ("HCBS") Waiver for the Elderly and Persons with Physical Disabilities ("EPD") to the federal Centers for Medicare and Medicaid Services ("CMS") for approval.¹ Our comments address the waiver renewal draft DHCF shared with the public on May 6, 2016, which is the original amendment approved by CMS in October 2015 with notations indicating areas of substantive change.²

By way of background, the Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the years, Legal Aid attorneys and volunteers have served tens of thousands of the District's neediest residents. Legal Aid has represented and continues to represent and advocate on behalf of individuals in the EPD Waiver Program. We share the goal of the Department of Health Care Finance ("DHCF") to make changes to improve service delivery and options for District's residents who rely on these essential services.

Legal Aid celebrated the roll-out of the participant-directed community support program, Services My Way, as a new option for waiver participants.³ The Services My Way allows individuals to have choice and control over how services are provided and by whom. Participants select and hire their own attendant staff rather than receiving services through a home care

¹ Pursuant to the CMS public notice process, the Department of Health Care Finance is required to share with the public any significant changes proposed to the EPD Waiver before submission of the renewal application.

² Waiver Number DC.0334.R03.00 proposed effective date 1/4/2017.

³ Hannah Weinberger-Divack, *New DC Program to Increase Autonomy for People with Disabilities*, MAKING JUSTICE REAL (Mar. 17, 2016), <http://www.makingjusticereal.org/new-dc-program-to-increase-autonomy-for-people-with-disabilities#more-5283>.

agency. With the aim of ensuring that participant-direction benefits those who chose it, we write to share concerns in three areas of the waiver renewal specific to the participant-directed program.

1. The new, lifetime “three-strikes” rule is too harsh for participants who may be in the program for decades.

The current waiver specifies that participants are allowed three episodes of non-compliance in the Services My Way program in the first 12 months of the program, and every 12 month period thereafter. Appendix E at 19. The proposed amendments remove the reference to the 12-month time periods and state instead that participants will generally be allowed three episodes of non-compliance in the program. After the third episode, participants will be terminated from the program and forced back to agency-based care. By definition, episodes of non-compliance are mere mistakes and do not include fraud, theft, or other criminal behavior. See Appendix E at 26.

This change is short-sighted and harmful to participants. Going forward, participants with chronic health care needs may be in the program for decades. It is easy to imagine a participant making two mistakes in the first year while learning how to navigate this new program, and then being terminated years later for a third, minor error. As a result, the participant will lose control over who is providing services, how, and at what times. Thus, a lifetime three-strikes rule is too harsh.

The current policy of allowing three mistakes *each year* should not be changed. It is more fair to participants and better serves the purpose of this important program.

2. The involuntary termination substantiation process should include an opportunity for participants to respond to any allegations of fraud.

In the proposed amendments to the Services My Way program description, a participant can be involuntarily terminated for substantiated findings of fraud, theft, or other criminal behavior. The proposed amendments would allow for termination when there are “credible allegations of fraud, theft, or any other criminal behavior” as “substantiated” by the DHCF Division of Program Integrity. Appendix E at 26. The provision does not include any language about a participant’s right to respond to the credible allegations of fraud while DHCF is completing its investigation.

The waiver should be amended to include the rights of participants to be notified of and respond to any credible allegations against them before services are terminated. Including the right of participants to respond to allegations will avoid unnecessary terminations and reduce the need to file appeal with the Office of Administrative Hearings (“OAH”).

3. Participants should have an opportunity to continue receiving services after receiving a termination notice if they have a good reason for filing their appeal beyond the 30 day time limit.

Services My Way participants have the right to remain enrolled in the program and continue to receive services after a receiving a termination notice, if they file a notice of appeal with OAH within 30 days. *See Appendix E at 26.*

The waiver should be amended to add that participants who have a good reason for filing an appeal after 30 days should also have the right to continue receiving services through participant-direction. Good reasons for late filing include, but are not limited to:

- Circumstances impeded the participant's ability to file timely;
- DHCF actions were confusing or misleading;
- The participant's physical, mental, educational, or linguistic limitations prevented him or her from timely filing; or
- The claimant did not receive the notice of termination.

Allowing participants to continue receiving services in the program if they have a good reason for filing late is a fair policy that will better protect our city's vulnerable residents.

Conclusion

Legal Aid appreciates the opportunity to submit these comments, and we look forward to working with the DHCF to ensure that the District's most vulnerable residents—seniors and individuals with disabilities—receive the critical services they need through the EPD Waiver Program.

Sincerely,



Hannah Weinberger-Divack
Staff Attorney