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**Before the Committee on Health
Council of the District of Columbia**

Performance Oversight Hearing Regarding the Department of Health Care Finance

March 5, 2020

The Legal Aid Society of the District of Columbia¹ submits the following testimony regarding the Department of Health Care Finance’s (DHCF) administration of the Home and Community-Based Waiver Program for the Elderly and Physically Disabled (EPD Waiver), and in particular the provision of Personal Care Aide (PCA) services to EPD Waiver beneficiaries. EPD Waiver services – which include but are not limited to PCA services, case management services, homemaker services, and adult day health services – allow Medicaid beneficiaries who might otherwise need to live in nursing home facilities to remain at home, living in the community.

In the summer of 2018, DHCF implemented three substantial changes to home health care services under the Medicaid program that applied to both the state plan and the EPD Waiver: (1) a new contractor, Liberty Healthcare Corporation, responsible for conducting level-of-care determinations, (2) a new assessment tool, the InterRAI assessment tool, to determine the amount and scope of home health care services that are medically necessary for beneficiaries, and (3) a new computer system, D.C. Care Connect, to manage the home health care services benefit.

After these changes went into effect, Legal Aid and other service providers saw a large increase in the number of Medicaid beneficiaries whose PCA services were drastically reduced, or in some cases, terminated altogether.

¹ 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.” Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 88 years, Legal Aid staff and volunteers have been making justice real – in individual and systemic ways – for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

DHCF has met with stakeholders on several occasions to discuss concerns about the 2018 changes, and there appear to have been some improvements based on these conversations. For example, we have had multiple clients whose PCA service hours have been restored or increased upon reassessment. However, Legal Aid remains concerned that the InterRAI assessment tool is not adequately capturing the medical needs of EPD Waiver beneficiaries, including the over 1,000 District residents whose waiver services were terminated or reduced in FY18.²

Additionally, Legal Aid is opposed to DHCF's recent proposal to cap Personal Care Aide (PCA) services for all EPD Waiver beneficiaries at 16 hours per day. We understand that DHCF is concerned about the costs of the waiver program, but capping PCA hours without ensuring that there are other viable alternatives for care for these vulnerable clients places them at serious risk of harm or institutionalization.

Home Health Care Services Are Vital for District Residents with Significant Medical Needs

Home health care services are a critically important benefit under the District's Medicaid program. In the District, any Medicaid beneficiary who demonstrates a medical need for a home health aide to complete important activities of daily living may receive a limited amount of Personal Care Assistance. Beneficiaries who require a higher level of care due to more serious limitations may receive more intensive home health care services care, including case management services, through the EPD Waiver program. PCA services allow people to safely complete routine daily activities, such as using the toilet, getting around inside their homes, managing their medication, preparing food and getting dressed, when it would otherwise be dangerous for them to attempt to do so alone. These services can help beneficiaries remain in their homes and communities when they would otherwise need to receive care in residential nursing facility.

Based on our representation and other interactions with individuals' receiving or applying for these services, Legal Aid is concerned about DHCF's administration of these services.

The InterRAI Assessment Tool Does Not Adequately Capture the Medical Needs of Beneficiaries

The InterRAI assessment tool is a standardized, face-to-face needs-based assessment used to determine each person's level of need for long-term care services and supports.³ The assessment results in a total numerical score that includes three separate scores pertaining to a person's functional, cognitive/behavioral, and skilled care needs.⁴ People with a total score of at least 9 qualify for the EPD Waiver.

² DHCF FY19-FY19 Oversight Responses, Q56 and Q57.

³ DHCF FY18-FY19 Oversight Responses, Q15.

⁴ Id.

The functional part of the assessment evaluates the type and frequency of assistance the person requires for various activities of daily living and instrumental activities of daily living.⁵ For each activity, the assessor selects which of the following assistance is needed for the person to complete the activity: Independent, Setup Help Only, Supervision, Limited Assistance, Extensive Assistance, Maximal Assistance, or Total Dependence. Each of these options have a corresponding score and range of PCA service hours associated with that score. A person's PCA service hours are determined only by scores related to the assistance they need with activities of daily living.⁶

Since the InterRAI assessment tool was first implemented, Legal Aid has seen inconsistent and concerning results. Clients who had been receiving a substantial number of hours of PCA services for years saw extreme reductions without any corresponding improvement in their conditions. Some of these clients then saw an increase in hours upon reassessment, again without any corresponding improvement in their conditions. For example, a client who has consistently needed substantial assistance with his activities of daily living due to mobility limitations was assessed in January 2019 and his PCA service hours were reduced from 16 hours per day to 9 hours per day. But when he was reassessed in February 2020, he was approved for 16 hours per day. Inconsistent results like these raise concern about the tool's and/or assessor's ability to accurately capture the medical needs of beneficiaries.

Further, in discussing the assessment tool with DHCF and service providers, Legal Aid has learned that the Registered Nurse assessors do not have the discretion to adjust the score if they observe medical needs that are not captured by the tool itself. For example, as currently administered, the assessment tool has a look back period of three days although regulations require a look back period of seven days.⁷ This means that when assessing activities of daily living, the RN assessor is only supposed to score the assistance needed in the three days prior to the assessment. If the person assessed has needed extensive assistance with an activity of daily living in the three days prior to the assessment but maximal assistance with that same activity just outside the three days, the RN has to select extensive assistance is needed for that activity. There is no mechanism for the RN assessor to recommend the need for a higher level of assistance with activities of daily living if that need is not adequately captured by the tool itself.

The tool also fails to capture the need for safety monitoring to complete activities of daily living. If the person being assessed indicates a need for safety monitoring to complete their activities of daily living, there is no mechanism for factoring this need for PCA services into the functional score. For example, a 93-year-old client's medical conditions included fainting. She was not able

⁵ Id.

⁶ Activities of daily living used to determine PCA service hours are bathing, dressing, eating, transfer/mobility, and toileting. Instrumental activities of daily living that do not factor into PCA service hours include meal preparation, housework, shopping, and transportation.

⁷ 29 DCMR 989.11.

to predict when she would faint and presented a fall risk. She lived alone, and while she did not always need hands-on assistance from her personal care aide to complete her activities of daily living, she did need someone present for safety monitoring during each activity of daily living given her condition. This client's hours were reduced from 24 hours per day to 14 hours per day after her InterRAI assessment. However, upon DHCF's reconsideration (or review) of the assessment and materials this client submitted in support of her hours being restored, the agency approved her to receive 24 hours per day of PCA services.

The Proposed Cap on PCA Services for EPD Waiver Beneficiaries Would Place the Most Vulnerable Enrollees at Serious Risk of Harm or Institutionalization

DHCF has proposed an amendment to the EPD Waiver that includes limiting PCA services for waiver participants to 16 hours per day.⁸ Legal Aid has represented multiple individuals who require 24 hours per day of PCA services in order to safely complete their activities of daily living and avoid institutionalization. These individuals have needed 24 hours of care for conditions such as dementia and a danger of wandering, paralysis resulting in the use of urine and colostomy bags that need to be changed every three hours to avoid infection, and limited mobility combined with incontinence that limits their ability to go to the bathroom, clean themselves up, or change their adult diaper on their own without risk of falling.

As written, the proposed EPD Waiver amendment would limit PCA services to 16 hours per day with no exceptions based on medical need.⁹ DHCF is required to provide services to individuals in the "least-restrictive setting" and in such a way as to not create a serious risk of institutionalization.¹⁰ Legal Aid is concerned that this type of inflexible cap will make it more likely that beneficiaries who currently (or who would in the future be) approved for 17 to 24 hours of PCA services per day would need to be institutionalized to get medically necessary assistance with activities of daily living.

There is a Lack of Evidence Demonstrating that the Medical Needs of Beneficiaries Currently Receiving 17 to 24 Hours Will Be Met By Other EPD Waiver Services if a Cap is Implemented

In the proposed amendment, DHCF states that any reduction in PCA hours to EPD Waiver participants receiving between 17 and 24 hours of PCA services per day will be offset by the inclusion of appropriate alternative services in the participant's person-centered plan, *e.g.* adult

⁸ Application for 1915(c) HCBS Waiver: Draft DC.003.04.08 – April 04, 2020, p. 2 (https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page_content/attachments/EPD-Waiver-Amendment-April-2020.pdf).

⁹ *Id.* at p. 16.

¹⁰ Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999).

day health, Personal Emergency Response System, homemaker, and chore aide.¹¹ However, Legal Aid is still concerned that these alternative services will not be able to provide medically necessary assistance with completion of activities of daily living for all those who would be affected by the proposed cap. Our specific concerns include the following:

1. **Adult Day Health Program Services:** It seems that DHCF is expecting these services to make up a substantial portion of the care for people who currently receive more than 16 hours per day of PCA services. However, it is unclear whether the District's Adult Day Health Programs have the capacity or the capability to meet the needs of beneficiaries that would be affected by the cap, *i.e.* those who require constant or near-constant monitoring, such as people with advanced dementia or those experiencing paralysis. Further, these services are limited to 8 hours per day, 5 days per week leaving two days during which people affected by the cap would need additional PCA service hours to complete activities of daily living.¹²
2. **Homemaker and Chore Aide Services:** These services are not meant to provide the assistance with activities of daily living that PCA services do. It is unclear how DHCF contemplates they will make up for the loss of PCA services caused by the cap.
3. **Personal Emergency Response System:** The proposed EPD Waiver amendment would make this system available to beneficiaries in the Medicaid State Plan as well as those in the EPD Waiver. However, an emergency response system cannot prevent injuries in the same way that a personal care aide can. People who need substantial assistance with activities like walking, transferring, using the toilet, and bathing will only be able to notify emergency services in the event of an accident.

While we acknowledge the alternative waiver services might meet the needs of some beneficiaries who are receiving or would be receiving over 16 hours of PCA services, we are not confident that DHCF knows whether these alternative services will meet the needs of everyone affected by the proposed cap.

Conclusion

Legal Aid urges DHCF to continue assessing the capabilities of alternative EPD Waiver services to meet the needs of beneficiaries currently receiving over 16 hours per day of PCA services before implementing the cap. We would also urge the agency to consider allowing PCA services in excess of 16 hours per day on an individually-determined, as-needed basis and allowing waiver participants who currently receive 17 to 24 hours of PCA services per day to continue to receive those services after the changes are implemented.

¹¹ Application for 1915(c) HCBS Waiver: Draft DC.003.04.08 – April 04, 2020, p. 16 (https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page_content/attachments/EPD-Waiver-Amendment-April-2020.pdf).

¹² *Id.* at 65.

Further, we ask DHCF to ensure that registered nurse assessors are adequately trained to deliver the assessment in a consistent manner and to consider allowing these nurse assessors the discretion to recommend a higher level of assistance than what is captured by the InterRAI assessment tool. We ask the agency to identify a way to account for other gaps in the current assessment tool that might lead to insufficient Personal Care Aide service hours, as well.

Legal Aid also urges the Committee to exercise its oversight authority to determine how many EPD Waiver beneficiaries will be affected by limiting PCA services to 16 hours per day and whether the other EPD Waiver services are equipped to adequately meet the needs of affected beneficiaries for up to 8 hours each day.