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## LEGAL RESOURCES PROGRAM UPDATE

**Dated: May 2004, amended April 2011**

### **CERTIFIED HOME HEALTH AGENCIES MAY NOT DENY, REDUCE OR TERMINATE CHHA SERVICES, AGAINST DOCTORS' ORDERS, WITHOUT THE AFFORDING NOTICE, HEARING, and "AID CONTINUING" RIGHTS**

Certified Home Health Agencies, known as "CHHAs," may not unilaterally deny or cut hours of Medicaid "home health aides" or other Medicaid home health services. Under an important federal court decision, called *Catanzano v. Dowling*, 60 F.3rd 113 (2nd Circuit 1995), a CHHA client is entitled to notice and fair hearing rights before her services are cut or terminated. This gives CHHA clients essentially the same rights as personal care or home attendant clients -- the right to request a hearing and continue to receive the former level of home care as "aid continuing" until the hearing is held and decided. New applicants denied admission to the CHHA may not receive "aid continuing," but are entitled to a hearing to contest the denial. There are very few limited exceptions to this right.

The State budget enacted in late March 2011 included extensive changes in reimbursement for Medicaid Certified Home Health Agency (CHHA) services. Some of these changes are effective immediately - on April 1, 2011 - and will likely result in reduced reimbursement for CHHA services. See changes described at <http://wnylc.com/health/news/17/>. None of these changes requires or allows immediate reduction or termination of CHHA services. Soon after the budget was passed, there have been numerous reports of some CHHAs sharply reducing hours of home health aide services, or of refusing to reinstate home health aide services after their patients were hospitalized or in short-term rehabilitation. CHHAs have misinformed patients and their families that Medicaid law no longer allows 24-hour care. These actions violate existing state law and regulations.

**On April 8, 2011, the State Commissioner of Health sent all CHHA administrators a directive reminding them of some of the requirements under state law described in this fact sheet. [See DOH Letter April 8, 2011](http://wnylc.com/health/afile/76/99/), posted at <http://wnylc.com/health/afile/76/99/>.**

#### **I. RIGHTS OF CURRENT CHHA RECIPIENTS, INCLUDING THOSE TEMPORARILY IN HOSPITAL OR NURSING HOME, TO CONTINUE RECEIVING SERVICES AS LONG AS THE DOCTOR CERTIFIES THAT THE CURRENT HOME CARE IS NECESSARY.**

Before the CHHA cuts services for any of the reasons listed here, the CHHA must refer the case to the local Medicaid office (HRA in NYC), which then must send the client a Notice with the right to request a hearing to contest the proposed reduction or termination, and with the right to receive "aid continuing" -- the same services the client

has been receiving -- until the hearing is held and decided. At the hearing, the client can challenge the proposed cut.

NOTE that individuals who received CHHA services immediately before being hospitalized are considered "recipients" for purposes of having the right to notice, hearing, and aid continuing described here. See regulation cited at end of this leaflet.

**A. Here is when the CHHA must refer a recipient's case to HRA to give notice, with the right to request a hearing and *aid continuing*, before cutting services:**

1. client's medical condition has changed or improved or therapeutic goals have been attained and client can function independently or with other support,
2. services are no longer sufficient to meet changing needs and maintain recipients' health & safety, and client needs institutional placement or alternative care.
3. client is not self-directing and no one is available to direct care, or client, family, or informal supports are non-compliant with or interfere with plan or care to the extent that it will lead to an immediate deterioration of the patient's condition serious enough that home care will no longer be safe and appropriate, or making it impossible to attain reasonable therapeutic goals
4. fiscal assessment - cost of care is too high so care must be terminated or cut NOTE: this has been repealed and is no longer a basis for discontinuance.
5. services can be reduced by using "efficiencies" like cluster care or PERS
6. **client was hospitalized and now CHHA does not want to reinstate services. THIS IS NO LONGER A REASON FOR TERMINATION, under Catanzano.** The CHHA must reinstate services after a hospitalization, in the same amount of hours provided before. Only if one of the reasons listed in (1) - (5) above exist may the CHHA refer the case to HRA to give notice of that reason, but meanwhile **MUST** reinstate the former amount of home care upon discharge while HRA issues a notice, and a hearing is requested.
7. If the client requests the CHHA to stop services, the CHHA must still continue services if the client's physician believes that services should continue. In such cases the CHHA should refer the case to HRA to send the client notice with hearing rights.

ALERT: The client's doctor must sign orders every 60 days on a "Physician's Certification and Plan of Care" form prepared by the CHHA. If on this form, or elsewhere, the doctor signs for reduced hours, or for termination of services, the CHHA does not have to provide notice and the right to a

hearing with "aid continuing." So it is very important that doctors read orders carefully before signing them, and understand their patients' rights to receive the care they prescribe, even if the CHHA says it is "too expensive" or "Medicaid doesn't pay for it anymore."

**NOTE: Services shall not be diminished or discontinued solely because of the change in the patient's source of payment or the patient's inability to pay for care. 10 NYCRR 763.5(f)**

**This provision should apply to prohibit a CHHA from reducing services solely because of changes in Medicaid reimbursement enacted by the state effective April 2011.**

**B. EXCEPTIONS: CERTAIN CONDITIONS WHEN THE CHHA CAN CUT OR DENY SERVICES WITHOUT REFERRING TO HRA (Local District) TO GIVE NOTICE AND THE RIGHT TO A HEARING:**

1. If conditions in the home imminently threaten the safety of CHHA personnel or jeopardize the agency's ability to provide care. EXAMPLES: physical assault likely to happen, presence of weapons, criminal activity or contraband material or continuing severe verbal threats creating a reasonable concern for safety of CHHA personnel, or
2. If CHHA has valid reason to believe that CHHA personnel will be subject to continuing severe verbal abuse which will jeopardize the agency's ability to secure sufficient staff or provide care.
3. The reason for the reduction or termination is one listed in "A" above, and the client's doctor agrees that services can be reduced or terminated.

NOTE: Even in such "exception" cases, the CHHA must follow requirements of the Department of Health for "discharge planning," which require consultation with the client's doctor and other supports, and continuation of "services to the extent necessary to address minimally essential patient health and safety needs until such time as an alternative placement becomes available and such placement is made, or until the patient or legal representative makes an informed choice to refuse such placement." The CHHA must make a referral to PSA.

**II. RIGHTS OF NEW APPLICANTS.**

If CHHA wants to DENY home health services prescribed by the physician, in certain circumstances it must refer the case to HRA to review the CHHA's decision and give NOTICE to the client of the right to request a hearing.

- A. DENIALS because client is appropriate for an "efficiency" such as shared aide, home attendant, PERS, etc.

CHHA MUST send case to HRA to review. If HRA agrees with CHHA, HRA must send client NOTICE of denial with right to request a hearing. If HRA

disagrees with CHHA, it must find a CHHA to take the case or DIRECT a CHHA to take case.

B. DENIALS based on health and safety.

1. CHHA rejects case because the services ordered by the physician "Cannot maintain the client's health and safety in the home" for one of the following reasons:

(1) Client does not meet any ONE of the following:

- i. she is self-directing, OR
- ii. is able to call for help to someone outside who can provide timely assistance; OR
- iii. can be left alone - does not require continuous presence to meet ongoing health and safety requirements, OR
- iv. has informal supports or, if in adult home, adult home personnel, who are able, available and willing to provide care when CHHA personnel not present.

(2) Based on CHHA's previous experience with delivery of care from the agency, client or informal supports are known to repeatedly refuse to comply with plan or care or interfere with plan or care to the extent that it will lead to an immediate deterioration of the patient's condition serious enough that home care will no longer be safe and appropriate, or making it impossible to attain reasonable therapeutic goals.

2. If CHHA believes client meets one of 2 criteria above, the CHHA must consult with the physician and develop, if possible, a plan of care that would maintain health and safety. If they cannot develop a plan of care that the CHHA believes would maintain health and safety, the CHHA must follow these procedures:

(1) HOSPITALIZED Medicaid recipient -- CHHA must refer case to discharge planner who will attempt to find another CHHA. If no CHHA can be found, discharge planner OR original CHHA must refer case to HRA, with copy of CHHA's assessment, physician's order. They must advise client case referred to HRA.

(2) NON-HOSPITALIZED recipient B CHHA must refer case they reject to HRA.

3. HRA, upon referral, must have local medical director evaluate case within 10 days to decide whether CHHA services should be provided in accordance with physician's order, or denied contrary to physician.

If HRA agrees with CHHA to DENY care, HRA must send NOTICE with right to request a hearing. If HRA disagrees with CHHA and believes

CHHA services can maintain health and safety, HRA must attempt to refer case to a CHHA. If HRA can't find a CHHA that will take case, HRA must DIRECT CHHA to admit recipient and provide services ordered by physician.

4. EXCEPTIONS - The CHHA does not have to refer the case to HRA if the reason it is rejecting the case is listed above in Section B (imminent threat to safety of CHHA personnel or patient's doctor AGREES with CHHA's denial). Even then, CHHA must refer to PSA.

### III. ADVOCACY TIPS

- A. If CHHA denies services, or threatens to cut or stop services, ask the client's doctor if he or she signed an order approving a reduction in services, and if s/he meant to sign such an order. Often the doctor signed this order unknowingly or having been told that a reduction or termination was required by Medicaid law. Once doctor is informed that s/he may and should prescribe what is medically necessary, s/he may be glad to clarify. If so, ask doctor to send a corrected order to the CHHA, specifying the amount of home health aide hours that are medically necessary. Keep a copy.
- B. If CHHA does not obey doctor's corrected order, ASK FOR A HEARING (see D below and ask to talk to the CHHA's director or lawyer. Tell the director or lawyer about Catanzano and the state regulations cited below.
- C. If the CHHA case has been "converted" to personal care/home attendant services, but the hours have been reduced, ASK FOR A HEARING with AID CONTINUING to keep the CHHA's old amount of hours.
- D. TO REQUEST A HEARING:

PHONE: 212-344-0055  
800-342-3334 statewide toll-free  
FAX: 518-473-6735

Mail: NYS Fair Hearings POB 1939 Albany NY 12201-1939

REQUEST FORM <http://www.otda.state.ny.us/oah/FHREQ.pdf>

FORM adjournment request  
<http://www.otda.state.ny.us/oah/ADJOURNMENT%20FAX%20FORM.pdf>

ONLINE: <http://tinyurl.com/2QTEWA>

For more information: The regulations summarized here of the State Dept. of Health are at Appendix I of 18 NYCRR § 505.23, as revised 3/96, and 10 NYCRR 763.5. The 1996 amendment requires CHHAs to re-instate services for hospitalized clients when they are ready to return home from the hospital, as established in Granato v. Bane, 74 F.3d 406 (2d Cir. 1996) and by Catanzano order dated March 20, 1996.