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December 18, 2013

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Re: Failure to Budget MMMNA for Spouses Executing a Spousal Refusal

Dear Ms. Lane and Ms. Kaszynski:

On behalf of the Elder Law Section of the New York State Bar Association, we are writing to you to address HRA's practice of failing to budget a Community Spouse Monthly Income Allowance (CSMIA) in connection with a nursing home Medicaid application where the spouse in the community files a spousal refusal as to assets. Since 2012, a significant number of community spouses have been denied a CSMIA to which they are entitled.

At least four Fair Hearing decisions issued in the past year have held that HRA's failure to budget a CSMIA when the spouse in the community files a spousal refusal as to assets is contrary to NYS ADM 91-ADM-33 and the NYS DOH Medicaid Reference Guide at page 396. The first known hearing decision, dated March 1, 2013 (copy attached), reverses an HRA determination dated Sept. 20, 2012. The decision cited these authorities and held, "The Agency's determination not to

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calculate a CSMIA based on the execution of a spousal refusal cannot be sustained.” Fair Hearing 6208131N. The decision specifically rejected an argument raised by HRA’s counsel that relied on 89-ADM-47 as authority to deny the CSMIA. The fair hearing decision specifically held that the later 91-ADM-33 amended the 1989 ADM cited on this point and entitles the spouse to the CSMIA. At least three subsequent decisions, listed in the chart below, reached the same result.

HRA determination date	FH decision	Link to FH decision
9/20/12	3/1/13	<a href="http://otda.ny.gov/fair%20hearing%20images/2013-3/Redacted_6208131N.pdf">http://otda.ny.gov/fair%20hearing%20images/2013-3/Redacted_6208131N.pdf</a>
10/22/12	5/24/13	<a href="http://otda.ny.gov/fair%20hearing%20images/2013-5/Redacted_6258047L.pdf">http://otda.ny.gov/fair%20hearing%20images/2013-5/Redacted_6258047L.pdf</a>
12/4/12	9/4/13	<a href="http://otda.ny.gov/fair%20hearing%20images/2013-9/Redacted_6291138Y.pdf">http://otda.ny.gov/fair%20hearing%20images/2013-9/Redacted_6291138Y.pdf</a>
2/15/13	9/5/13	<a href="http://otda.ny.gov/fair%20hearing%20images/2013-9/Redacted_6318971R.pdf">http://otda.ny.gov/fair%20hearing%20images/2013-9/Redacted_6318971R.pdf</a>

Yet despite this clear, official interpretation of State policy, HRA has continued to deny community spouses the CSMIA that they are entitled to. After the first hearing decision issued March 1, 2013, HRA continued to defend denials of the CSMIA issued prior to that date, and was reversed in the three hearing decisions in the table above.

Moreover, HRA’s Nursing Home Eligibility Division continues to apply this policy after March 1, 2013 to deny the CSMIA. Here are three examples, with documentation attached.

1. Notice of Acceptance, dated 10/15/13, Woodmere Rehab & HCC, approving Medicaid with a NAMI of \$3244/month (copy attached). No mention is made that the notice implicitly denied the CSMIA to the spouse, who had done a spousal refusal.
2. LEO Lxxx – On Sept. 25, 2013, HRA NHED reauthorized his Medicaid with *no CSMIA* (budget attached), which reversed HRA’s own prior Medicaid acceptance in October 2010 that budgeted a CSMIA for his wife, Helen Lxxxxx, who had filed a spousal refusal (notice attached). The CSMIA has been about \$1,646, and the institutionalized spouse has been paying a substantial NAMI of about \$4,750/month, after part of his income has been allocated to his spouse for these three years. The September 25, 2013 Notice fails to include any notice that the previously authorized CSMIA was being terminated, with the right to appeal.

When the community spouse asked both the nursing home and HRA why no CSMIA was allocated, she was told that she had to withdraw her spousal refusal in order to reinstate the CSMIA. On October 4, 2013, without the advice of counsel, the community spouse rescinded her spousal refusal. On November 7, 2013, HRA issued a revised budget that allocates a CSMIA. Since then, under advice of counsel, the community spouse has again reinstated the spousal refusal, and is again at risk of being denied the CSMIA.

3. On May 2, 2013, HRA issued a renewal notice that budgeted a NAMI of \$918.88 for a resident of the Carmel Richmond nursing home in Staten Island (redacted copies attached). The notice fails to mention that HRA was discontinuing a CSMIA for his spouse that HRA had previously approved for the preceding five years since Mr. P was first approved for Medicaid in October 2008. Now, in 2013, the nursing home told the spouse that she had to withdraw her spousal refusal. (See attachment). During these five years, the wife has depleted her own assets and, in fact, no longer needs the spousal refusal. She has now submitted a withdrawal of the spousal refusal, which is pending. However, she should not have been put through this stress, and others in her situation are still entitled to an CSMIA without withdrawing a spousal refusal.

We know of a number of other cases that elder lawyers or other advocates were able to resolve with HRA without a hearing, but only after months of delay and with aggressive advocacy.

We are alarmed to hear of other cases in which the community spouse, like the third example cited above, was pressured by the nursing home or by HRA to withdraw her spousal refusal in order to be budgeted for a CSMIA. No doubt there are many couples who lack any representation where the community spouse is deprived of vital support through the CSMIA.

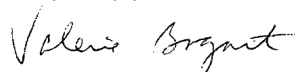
The above fair hearing decisions are binding on HRA under *stare decisis* principles. Charles A. Field Delivery Service v. Roberts, 66 N.Y.2d 516, 495 N.Y.S.2d 111 (1985); Long v. Perales, 568 N.Y.S.2d 657 (2d Dept. 1991). HRA's continued practice of denying the CSMIA in these situations is clearly illegal. Moreover, the failure to provide timely and adequate notices to the community spouses with the right to a hearing to appeal the termination of a previously authorized CSMIA violates basic due process requirements.

We ask that you re-budget LEO Lxxxx (Case #2 above) with a CSMIA for his spouse, and confirm that HRA will immediately cease its illegal practice of denying the CSMIA to community spouses who executed a spousal refusal in all future determinations. Further, we ask that HRA identify, reopen and retroactively redetermine all eligibility notices issued since September 2012, or such other date on which HRA began this illegal practice of failing to budget the CSMIA where the community spouse executed a spousal refusal.

We would be happy to address this issue with you either in person or through a phone conference after the new year. Our Section is hopeful that we can resolve this issue without litigation. Please contact Valerie Bogart at [vbogart@nylag.org](mailto:vbogart@nylag.org) or 212-613-5074.

Thank you for your anticipated cooperation, and best wishes for the holidays.

Very truly yours,



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Encl.