



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237
www.health.ny.gov

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

April 15, 2011

DAL: HCBS 11-03

Subject: Clarification of DAL: HCBS 11-02

Dear Administrator:

On April 8, 2011, the Department issued a “Dear Administrator Letter” DAL-HCBS 11-02 clarifying the responsibilities of home care agencies before ceasing operations, refusing to accept referrals, or discharging patients. This letter will supplement that communication by clarifying when a Certified Home Health Agency (CHHA) may terminate or reduce services, as well as the rights of a patient once that decision has been made.

Acceptance, Retention and Discharge of Patients by a CHHA

Prior to accepting a patient, a CHHA must affirmatively assess a patient and confirm that his or her needs may be met through the provision of home care services by that agency (10 NYCRR §763.5(b)). Agencies may not discriminate against a patient based on source of payment, and may not diminish nor discontinue services solely because of a change in the patient’s source of payment(10 NYCRR §763.5(e) and (f)). Once a patient has been accepted by an agency, the agency is required to provide the services required by that patient in accordance with an interdisciplinary assessment and the plan of care developed from that assessment(10 NYCRR § 763.6).

An agency may not make the unilateral decision to change the services provided to a patient, as these services are tied directly to the assessment of the patient’s needs and the plan of care. Similarly, once the agency has accepted the patient, that patient may not be discharged unless:

- 1) Therapeutic goals have been attained and the patient can function independently or with other types of community support services;
- 2) Conditions in the home imminently threaten the safety of personnel providing services or jeopardize the agency’s ability to provide care;
- 3) The patient terminates all agency services;
- 4) The patient, the patient’s family, informal supports or any legally designated patient representative is non-compliant or interferes with the implementation of the patient’s plan of care and the scope and effect of that non-compliance or interference is such that, even after the

agency has explained the likely outcome of this behavior, the continued actions imperil the ability of the agency to provide the required services; or

5) The availability of home health services or community support services is no longer sufficient to meet the patient's changing care needs and to assure the patient's health and safety at home and the patient requires the services of a health care institution or an alternate health care provider (10 NYCRR §763.5(h)).

Even if one of these grounds for discharge exists, an agency may not discharge a patient until after consultation with, as appropriate, the patient, patient's family, the authorized practitioner, a legally designated patient representative and any other professional personnel involved in the patient's care. *Id.* If the basis for discharge is non-compliance or the fact that the patient's needs require the services of a health care institution or alternate provider, the CHHA must continue to provide services during the transition. *Id.* Moreover, the agency must initiate a discharge plan that assures a timely, safe and appropriate transition for the patient (10 NYCRR §763.5(g)).

Fair Hearing Requirements

Because CHHAs receive Medicaid reimbursement for services provided, they are also required to comply with Federal and State regulations that apply to all Medicaid providers. In addition, the courts have ruled that Medicaid recipients have the right to a State fair hearing to challenge certain proposed denials, reductions or discontinuances of home health services when those actions would be contrary to the recipients' treating physicians' orders. [See Catanzano v. Dowling, 847 F. Supp. 1070 (W.D.N.Y. 1994) and subsequent decisions in that case, as recited in DAL HCBS 11-01, issued February 10, 2011].

To afford Medicaid recipients these due process rights, the Department was required to adopt the Revised Catanzano Implementation Plan ("the Plan") and require that CHHAs comply with its provisions. Initially adopted in 1996, the Plan is currently found in Department regulations at 18 NYCRR Section 505.23(d), Appendix 1.

The Plan outlines the steps that a CHHA must follow when it intends to take certain action that is inconsistent with, or contrary to, the Medicaid recipient's treating physician's orders. Even if the reason for the CHHA's proposed action is permissible under Department regulations at 10 NYCRR Section 763.5, the CHHA must take these additional steps, as outlined in the Plan, if the CHHA intends to act contrary to the orders of the Medicaid recipient's treating physician. All CHHAs must consult the Plan and follow its relevant provisions, summarized below, when they wish to deny, reduce or discontinue a Medicaid recipient's home health services. By following these procedures, and also appearing at a State fair hearing should the recipient request a hearing, CHHAs will be able to implement the proposed denial, reduction or discontinuance should the fair hearing decision uphold the proposed action.

Applicants for home health services: Under the Plan, a home health services applicant includes each Medicaid recipient who is not currently receiving home health services and who resides in his or her own home or in any other community setting in which home health services can be provided and each hospitalized Medicaid recipient who did not receive home health services immediately prior to entering the hospital. Each home health services applicant has the right to a fair hearing notice from the

social services district and the right to request a State fair hearing when the district's local professional director or designee agrees with the CHHA's decision that the home health services ordered by the recipient's treating physician cannot maintain the recipient's health and safety in the home for certain specified reasons. The reasons are set forth at 10 NYCRR Sections 763.5(b)(1)(i) through (iv), 763.5(b)(2)(i) and 763.5(b)(2)(iv). These provisions permit CHHAs to deny admission to patients who are not self-directing, are unable to call for help, cannot be left alone and have no informal supports and patients who, based on previous experience, are known to repeatedly refuse to comply with a plan of care. If a CHHA proposes to deny admission to a Medicaid recipient for one or more of these reasons, and the recipient's physician disagrees, the CHHA must follow the Plan's provisions relating to CHHAs at Sections 100-103. Applicants for CHHA services are not entitled to receive services until the fair hearing decision is issued.

Recipients of home health services: Under the Plan, a home health services recipient includes each Medicaid recipient who is currently receiving home health services in his or her own home or in any other community setting in which home health services can be provided and each hospitalized Medicaid recipient who received home health services immediately prior to hospitalization. Each home health services recipient has the right to a fair hearing notice from the social services district and the right to request a fair hearing with services to continue unchanged until the fair hearing decision is issued (aid-continuing) when the district's local professional director or designee agrees with the CHHA's decision to reduce the recipient's home health services or to discharge the recipient for certain reasons but the recipient's treating physician disagrees with the CHHA's proposed reduction or discharge.

When a CHHA, contrary to the treating physician's orders, proposes to reduce a recipient's home health services because the recipient's medical condition has improved, or for other reasons related to the recipient's health and safety, the CHHA must follow the Plan's provisions relating to CHHAs at Sections 206-211.

When a CHHA, contrary to the treating physician's orders, proposes to discharge a Medicaid recipient because the home health services ordered by the treating physician can no longer maintain the recipient's health and safety in the home for one or more of certain specified reasons, the CHHA must follow the Plan's provisions relating to CHHAs at Sections 200-205. These reasons are set forth at 10 NYCRR Sections 763.5(h)(1), 763.5(h)(4) or 763.5(h)(5). These provisions permit CHHAs to discharge patients who have met therapeutic goals, are non-compliant with the plan of care, or those whose health and safety can no longer be met in the home.

Regardless of whether a CHHA intends to reduce or discontinue a Medicaid recipient's home health services, it must continue to provide services unchanged until the fair hearing decision is issued when directed to do so by the social services district, the Department or the Office of Administrative Hearings (OAH) of the New York State Office of Temporary and Disability Assistance. The OAH issues aid-continuing directives and schedules and holds Medicaid fair hearings. Aid-continuing is required by Federal and State Medicaid law as well as by the Plan when Medicaid recipients timely request fair hearings to review certain proposed reductions or discontinuances of Medicaid funded services. The CHHA can continue to bill the Medicaid program for aid-continuing according under the payment methodology in effect at the time of such aid-continuing period.

Finally, it must be emphasized that all Medicaid recipients have the right under State fair hearing regulations to request fair hearings and this right cannot be limited or interfered with in any way. [See 18 NYCRR Section 358-3.1] This means that Medicaid recipients may request fair hearings when CHHAs propose to deny, reduce or discontinue recipients' home health services but the reason for the proposed denial, reduction or discontinuance does not appear to be covered in the Plan. If, in such case, the OAH issues an aid-continuing directive, each CHHA is expected to comply with that directive until any fair hearing decision is issued or until the OAH rescinds the aid-continuing directive. In addition, all CHHAs are strongly encouraged to appear at all State fair hearings and present evidence and testimony in support of the proposed denial, reduction or discontinuance of services. By doing so, CHHAs can increase the likelihood that the fair hearing decision will uphold the CHHA's action. Regardless of the outcome of the fair hearing, all CHHAs are also expected to comply with all fair hearing decisions that address proposed CHHA actions.

For questions or additional information on this directive, contact Mary Ann Anglin of the New York State Department of Health, Division of Home and Community Based Services at (518) 408-1600.

Sincerely,

A handwritten signature in black ink that reads "Mark L. Kissinger". The signature is written in a cursive style with a horizontal line at the end.

Mark L. Kissinger
Deputy Commissioner
Office of Long Term Care