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Client Alert

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Federal Court Issues Preliminary Injunction Preserving Medicaid Home Care Services for New York Residents

The United States District Court for the Southern District of New York recently granted a preliminary injunction in favor of a putative class of Medicaid beneficiaries that will preserve their access to 24-hour continuous home care services.[1] This decision highlights the tension between providing services to those in need and reducing expenditures in a time of budget crisis, with the court ultimately determining that the state's action of terminating and reducing of Medicaid services was not in compliance with the Medicaid Act and did not afford sufficient procedural due process.

Background

"Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals. The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations."[2] In New York, the agency responsible for administering Medicaid is the New York State Department of Health ("DOH"), and in New York City, the Medicaid program is administered by the New York City Human Resources Administration ("HRA"), acting as the local agent of DOH.[3]

DOH offers various levels of "personal care services" (personal hygiene, dressing, feeding, walking, and other activities of daily life) through Medicaid.[4] The two highest levels of personal care offered by DOH are "split-shift care" (so-called because multiple care givers provide care over separate shifts so that the patient can receive up to 24 hours of in-home care per day) and "live-in" or "sleep-in" care (so-called because care is provided by a single caregiver who "is able to sleep during the night without waking up to provide care except on rare occasions."[5] Personal care services are authorized based on an assessment of medical necessity by HRA. Once personal care services have been authorized, they may be reduced or terminated only following notice

1 *Charles Strouchler, et al v. Nirav Shah, M.D., as Commissioner of the New York State Dep't of Health, et al*, 12 Civ. 3216 (SAS) (S.D.N.Y. Sept. 4, 2012). A copy of the Opinion and Order is available here.
2 *Shakhnes v. Berlin*, ___ F.3d ___, 2012 WL 3264099, at *1 (2d Cir. Aug. 13, 2012).
3 Strouchler, at 4.
4 Id. at 4-5.
5 Id. at 5.

and an opportunity for administrative hearing.[6]

In 2011, HRA paid $70 million to settle claims that it violated the federal False Claims Act by authorizing and re-authorizing continuous 24-hour personal care services without the requisite assessments and approvals.[7] The United States had alleged that this practice "caused the federal Medicaid program to spend tens of millions of dollars on reimbursement on [personal care services] that [HRA] authorized improperly."[8] In its settlement with the United States, the HRA "explicitly acknowledged in the settlement: that 'the state Medicaid regulation for the [personal care services] program generally requires HRA to base its authorization of 24-hour [personal care services] care on a physician's, nurse's, and social assessment, as well as, in certain cases, an independent medical review.'"[9] Additionally, in its settlement agreement with the United States, HRA "committed 'to obtain independent medical reviews in connection with reauthorizing 24-hour split-shift care.'"[10]

Beginning around April or May 2011, HRA undertook to reduce split-shift cases through a review of all such care that was being re-authorized.[11] As a result of this initiative, the number of patients receiving split-shift care fell from 1,356 to 1,274 between January 1, 2010 and May 1, 2011 and fell from 1,135 to 945 from August 2011 through April 2012. Out of 270 appeals of the reduction or termination of split-shift care between August 1, 2011 and June 15, 2012, DOH's administrative law judges reversed 262 times (over 97%).[12]

The plaintiffs are elderly and disabled recipients of 24-hour continuous home care services provided through Medicaid who claim that they, and others similarly situated, have had their personal care services reduced or terminated "without adequate notice and legitimate reasons that comply with federal and state law and the federal Constitution."[13] These plaintiffs sought, on behalf of themselves and those similarly situated, an injunction preventing HRA from reducing or terminating their "split-shift" personal care services.

Analysis

The court concluded that "members of the putative class have been irreparably harmed as a result of defendants' actions" and that "if defendants' actions continue unabated, members of the putative class will imminently suffer more irreparable harm."[14] In reaching this conclusion, the court rejected the defendants' argument that "despite a ninety-seven percent reversal rate on appeal – the existence of a well-functioning

6 Id. at 5-6.
7 Id. at 6; see also Oct. 31, 2011 Press Release of the U.S. Attorney's Office for the S.D.N.Y. (available here).
8 Oct. 31, 2011 Press Release.
9 Id.
10 Strouchler at 6.
11 Id. at 7.
12 Id. at 8.
13 Id. at 2.
14 Id. at 38.

appeals process eliminates any harm."[15] In support of this conclusion, the court found that:

- Many putative class members had not received legally sufficient notice of the reduction or termination of their personal care services. This finding was based on evidence that HRA on multiple occasions sent recipients two inconsistent notices on the same day (one authorizing and one reducing or discontinuing split-shift care); issued a notice in Spanish to an English-speaking recipient; issued an illegible notice; and issued a notice that was never received and perhaps never mailed; sent boilerplate notices indicating the reason for the reduction was a "mistake" but failing to identify the alleged mistake.[16] "[T]hese improper notices increase the probability that a recipient will erroneously lose her benefits despite the availability of a fair hearing because they are not reasonably calculated to inform her of her right to a hearing."[17]

- At least three putative class members did not receive care pending the required hearing.[18]

- "[T]he mere threat of a loss of medical care … constitutes irreparable harm" such that "even home care recipients who do receive aid pending their fair hearing are likely to suffer irreparable harm as a result of the threatened reduction in their care."[19]

- HRA reduced the split-shift care of 312 people who did not appeal over the same time period during which those individuals who did appeal prevailed 97% of the time. It is "highly likely that many of the 312 simply failed to request a fair hearing because they did not receive or understand the notice or recognize their right to a fair hearing" and "that some of the people who did not request a hearing were in fact similarly situated to the people who requested and won hearings and that if they had requested a fair hearing, the ALJ would have ruled in their favor.[20]

The court further concluded that the plaintiffs were likely to prevail on their claims based on the Medicaid Act and procedural due process. The court noted that "defendants are obligated to use 'reasonable standards … for determining eligibility for and the extent of medical assistance under the plan' and to provide the same services to all eligible individuals who have the same need for those services."[21]

Additionally, DOH has failed to ensure compliance by its agent HRA with the Medicaid Act despite DOH's 97% reversal rate of HRA's decisions.[22]

15 Id. at 31-32.
16 Id. at 32-35.
17 Id. at 34.
18 Id. at 35-37.
19 Id. at 37.
20 Id. at 38.
21 Id. at 39 (quoting 42 U.S.C. § 1396a(a)(17) and citing 42 U.S.C. § 1396a(a)(10)(B)(i) and (ii)).
22 Id. at 38-44.

The court determined that the balance of interests weighed heavily in favor of injunctive relief because "Plaintiffs' interest in halting the improper reduction and termination of their benefits is significant" and DOH and HRA "have no legitimate interest in improperly reducing or terminating the benefits of people who are legally entitled to those benefits."[23] Acknowledging the public surely has an "interest in the orderly administration of split-shift services and other personal care services," the court countered that HRA's "implementation of the home care services program has been disorderly," as evidenced by the 97% reversal rate.[24] Thus, injunctive relief was in both the plaintiffs' and the public's interest.[25]

Based on its findings, the court entered an order limiting HRA's ability to reduce or terminate the split-shift care of any current recipient; requiring HRA to forward plaintiffs' counsel a copy of any notice terminating or reducing personal care services; and requiring DOH to publicly issue written clarification regarding the proper interpretation and application of certain regulations relating to the availability of split-shift care.[26]

23 Id. at 44.
24 Id. at 44-45.
25 Id. at 45.
26 Id. at 47-48.