

# 2455

# DISABILITIES LAW PROJECT

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VIA FACSIMILE NO. 717-772-6366 AND U.S. MAIL

June 26, 2006

Dawn Poppenwimer  
Director, Physical Health Services Section  
Office of Medical Assistance Programs  
Bureau of Policy, Budget and Planning  
Division of Regulatory and Program Development  
Department of Public Welfare  
Cherrywood Building #33  
Harrisburg, PA 17105

RECEIVED  
2007 FEB 21 AM 9:54  
INDEPENDENT REGULATORY  
REVIEW COMMISSION

Dear Ms. Poppenwimer:

A few weeks ago, you spoke with Chava Kintisch regarding the Department of Public Welfare's proposed revisions to its home health regulations, as stated in 34 Pa.B. 6544, dated December 10, 2004. The Disabilities Law Project and Pennsylvania Protection & Advocacy would like to bring two legal issues to your attention before publication in final-form.

We appreciate the Department removing the explicit homebound requirement from the home health regulations. Per CMS, "[i]f a State limits home health services to persons who are homebound, while not providing medically necessary home health services to persons who are not homebound, it is arbitrarily denying the home health service based on the individual's condition (i.e. whether or not the individual is homebound) in violation of regulations at [42 C.F.R. §] 440.230(c) . . . [i]f a State limits the provision of Medicaid home health services to individuals who are homebound, the State violates Federal requirements at [42 C.F.R. §] 440.240(b) by providing the services to some individuals within the eligibility group and not to others within the group." Attachment 3-g: Prohibition of Homebound Requirement in Medicaid Home

**Health – Clarification, July 25, 2000, Centers for Medicare and Medicaid Services.**

Proposed rule 55 Pa. Code § 1249.52(a)(2) requires the attending physician to certify "that the recipient requires care in the home and either of the following conditions exist:

- (i) The only alternative to home health agency services is hospitalization.
- (ii) The recipient has an illness, injury or mental health condition, documented in the recipient's medical records, which justifies that the service must be provided at the recipient's residence instead of a physician's office, clinic or other outpatient setting."

First, we are concerned that 55 Pa. Code § 1249.52(a)(2)(ii) still requires a person to have a physical or mental condition that justifies providing the service in the home rather than an outpatient clinic, which is merely another way of stating that the person must have a condition "that restricts the individual's ability to leave his residence" for outpatient care – i.e. is homebound. See 55 Pa. Code § 1249.2 (definition of homebound). Such a requirement is a violation of the comparability requirements of federal Medicaid regulations, 42 C.F.R. § 440.230(c) and 42 C.F.R. § 440.240(b), by arbitrarily denying medically necessary services based upon the person's condition and by denying medically necessary services to some persons within the eligibility group. Physicians looking at 55 Pa. Code § 1249.52(a)(2)(ii) would feasibly believe that the person must not be able to get to an outpatient clinic – i.e. is not able to leave the home without substantial assistance, or it is medically contraindicated to leave the home – in order for the physician to prescribe home health services. Instead of removing the illegal homebound requirement, it appears that 55 Pa. Code § 1249.52(a)(2)(ii) merely states the requirement in a different way.

This is particularly true where, as in Pennsylvania, adult recipients cannot receive physical therapy, occupational therapy, and speech services in an outpatient setting because these optional services are not in the State plan. Their only opportunity for receipt of these services through Medical Assistance, outside of an institution, is through a home health agency. Requiring the recipient to have a condition justifying receipt of the services in the home rather than an outpatient clinic will effectively prevent adult recipients who are not homebound from receiving medically necessary physical therapy, occupational therapy, and speech services, violating 42 C.F.R. § 440.230(c) and 42 C.F.R. § 440.240(b). We recommend that 55 Pa. Code § 1249.52(a)(2)(ii) be revised before publication in final-form.

Second, on February 9, 2005, the IRRC made the following comments to 55 Pa. Code § 1249.52(a)(2)(i): "It is our understanding that all recipients of MA can qualify for home health care services if they are residing or are eligible to reside in nursing homes, rehabilitative facilities or mental institutions. Therefore, the term 'hospitalization' should be replaced with a broader term that encompasses

all institutional care settings." Comments of the Independent Regulatory Review Commission on Department of Public Welfare Regulation #14-491 (IRRC #2452) Home Health Agency Services, February 9, 2005. However, federal Medicaid regulations prohibit a State plan from requiring that a person be in or qualify for institutional care to receive home health services. 42 C.F.R. § 441.15(c) ("[A] State plan must provide that . . . [t]he eligibility of a recipient to receive home health services does not depend on his need for or discharge from institutional care."). Therefore, 55 Pa. Code § 1249.52(a)(2)(i) appears to be contrary to federal regulations by requiring the person to need hospitalization to receive home health services. In addition, IRRC's comment that the provision should be broadened to include all institutional care settings is also not consistent with federal regulations. We recommend that 55 Pa. Code § 1249.52(a)(2)(i) be entirely removed before publication in final-form.

It might be more appropriate for 55 Pa. Code § 1249.52(a)(2) to instead state that the physician must document the medical necessity of the home health services in the patient record. See 42 C.F.R. § 440.230(d) ("The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures."). See also Medical Assistance Bulletin Number 01-87-01, Physicians' Responsibilities When Ordering Home Health Services, January 12, 1987 ("Document in the patient record the diagnosis and/or condition of the patient and why health services are being ordered and for how long."). This would ensure that no one in the eligibility group is excluded based on criteria other than medical necessity, consistent with federal law and CMS policy.

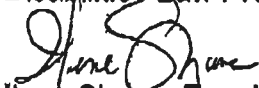
Finally, we also hope that the Department will remove all reference to the homebound requirement from Medical Assistance Bulletin 23-94-04. This would include, but is not limited to, removing the requirement of "homebound status; description of condition that restricts individual's ability to leave residence without assistance or makes leaving medically contraindicated."

Thank you for consideration of our comments.

Sincerely,



Chava Kintisch, Esquire  
Disabilities Law Project



Ilene Shane, Esquire  
CEO, Pennsylvania Protection & Advocacy

Cc: John Kane, Chief Legal Counsel (via facsimile and U.S. mail)

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FROM: Dawn Poppenhaver

DATE: 2/21/06

Pages (Including Cover): 4

RECEIVED

2007 FEB 21 AM 8:55

INDEPENDENT REGULATORY  
REVIEW COMMISSION

MESSAGE: Home Health Agency Svc - Proposed Regulatory  
Change to remove Homebased requirement  
Please note - one set of comments from two  
agencies - Disabilities Law Project + Pennsylvania  
Protection and Advocacy

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IN PENNSYLVANIA

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2455

February 16, 2007

Dear Arthur Coccodrilli,

RECEIVED  
2007 FEB 21 AM 10: 21  
INDEPENDENT REGULATORY  
HEALTH COMMISSION

I am writing as a representative of the Association for Professional Acupuncturists in PA to thank the committee for remaining patient and diligent on these set of regulations. We realize a lot of time and effort has been put into Regulations 16A-4919 by many legislators and state employees. We, as a small organization in the state of Pennsylvania, are grateful that we have been listened to in the process.

Acupuncture and Oriental Medicine is an ancient medical model, although is in its infancy stage in regulatory terms in the state of Pennsylvania. This set of regulations as written reflects more of what our profession is and wants to be. So We the Association for Professional Acupuncture are in support on how the final copy of 16A-4919 has been written and support IRRC on its final approval.

Sincerely,

Benjamin W. Griffith II R.Ac.

President of the Association for Professional Acupuncture