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March 27, 2015

Katherine Ceroalo
New York State Department of Health
Bureau of House Counsel, Regulatory Affairs Unit
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Re: Comments on Notice of Proposed Rulemaking – Revised Rulemaking
Immediate Needs for Personal Care Services 18 NYCRR §§ 360-3.7 and 505.14.
I.D. No. HLT-28-14-00008-RP

Dear Ms. Ceroalo:

Thank you for the opportunity to comment on the revised proposed regulations regarding Immediate Needs for Personal Care Services which would amend 18 NYCRR §§ 360-3.7 and 505.14.

Empire Justice Center is a not-for-profit public interest law firm focusing on civil legal services for low-income individuals. In addition to litigation and policy analysis, we support legal services programs across the state with training and technical assistance, and act as an informational clearinghouse. We focus on a number of issues affecting low income individuals and families: health and Medicaid, public benefits, Supplemental Security Income and Social Security Disability benefits, consumer and foreclosure prevention, and public and subsidized housing. A significant portion of our health law work focuses on helping Medicaid recipients access and maintain community-based long-term care services. Beyond assisting individual clients, we also educate advocates and providers about changes in the Medicaid program that affect beneficiaries. In recent years we have focused particular attention on the statewide roll out of mandatory Managed Long-Term Care (MLTC).

The revised proposed regulations amending 18 NYCRR §§ 360-3.7 and 505.14 implement the Order of Justice Joan Madden, Supreme Court, New York County, in *Konstantinov v. Daines*, 2010 WL 7746303 (N.Y. Sup.). Empire Justice Center supports the overall goal of the proposed regulations to ensure that individuals are able to access needed personal care services (PCS) to protect their health and safety while awaiting a Medicaid eligibility determination, or the implementation of a care plan by a managed care plan. We also appreciate the Department's consideration of our comments on the previous version of the proposed immediate needs personal care service regulations and its decision to incorporate some of our recommendations in to the revised rules. However, as drafted, the revised proposed regulations fail to fully implement the *Konstantinov* Order, introduce unwarranted eligibility

criteria, deny beneficiaries requisite due process rights, and fail to take into account the shift in the administration of long-term care services from local districts to Managed Long Term Care (MLTC) and Medicaid Managed Care Organizations (MCOs).

The Empire Justice Center therefore makes the following comments on the proposed amendments to 18 NYCRR §§ 360-3.7 and 505.14:

1. **Provide adequate notice of the availability of immediate needs personal care services.** Consistent with Justice Madden's Order in *Konstantinov*, adequate notice of the availability of immediate needs personal care services must be provided to all Medicaid applicants. The proposed regulations contain no notice provision whatsoever and thus fail to satisfy the court's Order. The proposed regulations must be amended to require notice of the availability of temporary personal care services. This notice should be included on the Medicaid application itself, posted at the offices of all local departments of social services (LDSSs), and posted on the websites for local districts and the New York State Department of Health (DOH). Additionally, notice also must be included on the New York State of Health Marketplace (Marketplace) electronic health care application.

The notice must identify the availability of immediate needs personal care services, clearly explain the process for requesting and receiving these services, and indicate applicable fair hearing rights, should the initial request for immediate needs personal care services be denied. The notice should be clear that an individual may request immediate temporary PCS at any time, including upon or after applying for Medicaid, after a favorable Medicaid eligibility determination and prior to receipt of PCS through a managed care product, and where there is an immediate need for an increase in the amount of PCS already received.

2. **Eliminate the proposed Protective Services for Adults requirement from the presumptive eligibility criteria. (18 NYCRR § 360-3.7(f)(3)(iv))** We strongly object to the introduction of a requirement that, in order to receive immediate needs personal care services, an applicant either be in receipt of Protective Services for Adults (PSA) or have a determination that a PSA investigation of the applicant is necessary. Such a requirement would exclude the vast majority of those with an immediate need for personal care services. Individuals are only eligible for PSA if they "have no one available who is willing and able to assist them responsibly." 18 N.Y.C.R.R. § 457.1(c). Yet, those eligible for personal care services must either be self-directing or have someone able to direct their care under 18 N.Y.C.R.R. § 505.14(a) and are, by definition, ineligible for PSA.

Nothing in existing personal care regulations permits the introduction of this new condition of eligibility and nothing in the *Konstantinov* Order compels it. We therefore urge that the PSA requirement be eliminated when the final regulations are implemented.

3. **Explicitly provide for the receipt of immediate temporary PCS through CDPAP.** Consumer Directed Personal Assistance Program services should be explicitly available

on a temporary basis based on presumptive eligibility for immediate temporary PCS, using a fiscal intermediary that contracts with the LDSS.

4. **Ensure seamless transition to an MLTC or MCO.** We urge the Department to ensure that any regulations and procedures that are adopted ensure a seamless transition from the receipt of immediate needs PCS to the receipt of PCS under managed care, avoiding gaps and disruptions in care.

As drafted, presumptive eligibility for immediate needs PCS covers only the period between the initial application for Medicaid and the LDSS authorization of personal care services under 18 N.Y.C.R.R. § 505.14(b)(2) after Medicaid eligibility is confirmed. (Proposed § 360-3.7(f)(6)(ii)(b).) The proposed cut off of presumptive eligibility at the point when an LDSS authorizes PCS fully ignore the shift towards MLTC. It also ignores the need to preserve continuity of care for a vulnerable population.

Presumptive eligibility should include the same 90-day transition rights applicable to the transition to mandatory MLTC enrollment. Further, to avoid unnecessary and harmful changes in services, presumptive eligibility should continue until MLTC or MCO enrollment is effective for those mandated into managed care.

5. **Full Due Process Rights, including the Right to Aid Continuing, must be provided.** We commend the inclusion of fair hearing rights for those denied presumptive eligibility for temporary personal care services. However, we strongly object to the denial of the right to aid continuing for presumptive eligibility for PCS upon a determination that an applicant is ineligible for Medicaid. (Proposed § 360-3.7(f)(7)(i).) The right to aid continuing is one of the most fundamental rights guaranteed by the Due Process clause of the 14th Amendment. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). The right to aid continuing is particularly critical where, as here, an individual faces a risk of substantial harm without continuation of the benefit. The sudden loss of personal care services will leave individuals home alone at risk of falls, other injuries and deteriorating health, resulting in hospitalization. Such situations demand the protection of aid continuing while awaiting a fair hearing decision, which may well be favorable to the individual.
6. **Fair Hearings must be expedited.** Social Services Law Section 133 creates a right to an expedited hearing to appeal a denial of emergency needs care. Therefore, all individuals who are denied, in whole or in part, immediate temporary PCS must be informed of their right to an expedited hearing and be granted an expedited hearing, if requested.

Additionally, individuals who are in receipt of immediate temporary PCS and subsequently found ineligible for Medicaid should automatically receive an expedited hearing under 18 NYCRR § 358-3.2(b)(9). A person who has been found to need immediate temporary PCS has health needs that would be jeopardized absent PCS. Such individuals should therefore be presumed to have an “urgent need for medical care, services or supplies,” 18 NYCRR § 358-3.2(b)(9), justifying an expedited hearing.

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Thank you for your consideration of these comments. We urge the Department to establish a system of immediate needs personal care services that can be easily integrated into the current structure of personal care authorization and delivery.

Respectfully Submitted,

/s/
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