

Temporary Personal Care Services for Persons in Immediate Need Proposed Changes to S.2007 and A.3007 Part B §§ 35 & 36

ELDER LAW AND SPECIAL NEEDS SECTION

Elder # 4

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The proposed changes to §35 and §36, and insertion of a new §36-a, provide for the continuation of temporary personal care services for persons in immediate need by the Medicaid program, rather than eliminating those services.

- These temporary services are especially vital because the current system of application for long term care services under the Medicaid Managed Long Term Care (MLTC) program can take an average of five months from application for Medicaid to the commencement of services.

Replace §35 with New Language

- Clarifies Social Services Law § 133 by specifically stating that temporary pre-investigation emergency needs assistance or care *includes* medical care, home care, and related services. Numerous courts have already ruled that the term “care” includes medical assistance, but this revision is appropriate in order to reject the Governor’s proposal to expressly *exclude* medical care, home care, and related services.

Replace §36 with New Language

- Creates a new subdivision 1-a to Social Services 364-i to create a category of presumptive eligibility where temporary personal care and consumer directed personal assistance services can be provided to persons with immediate needs. (Both personal care services and consumer directed personal assistance services are provided for because if there are skilled needs these can be provided through the consumer directed program and might otherwise be unavailable.)
 - Similar to the presumptive eligibility for hospital patients in current law SSL § 364-i(1).
- Requires a Medicaid application and a physician’s order documenting the need, recommending the number of hours of care services, and documenting that the individual’s health and safety can be maintained in the home. The temporary services would remain in effect until Medicaid eligibility was denied or the case was accepted and community based long-term care services commenced – whether by a managed long term care plan, another waiver program, or other type of Medicaid long term

care program would depend on the individual circumstances so is not specified in the proposal.

- The continuation of these services even after approval of the Medicaid application is critical because, under the new Managed Long Term Care model, enrollment in and commencement of services by the MLTC plan often takes three months or longer AFTER the Medicaid application is approved. Once the Medicaid application is approved, the services would be fully reimbursable by federal and state Medicaid dollars.
- The new proposed language tracks the Department of Health proposed regulation published in the Feb. 25, 2015, NYS Register in compliance with the Court order in *Konstantinov v. Daines*, 2014 NY Slip Op 30657(U), 2014 N.Y. Misc. LEXIS 1137 (N.Y. Sup. Ct., 2014).
 - The Governor's proposed §36 amending 364-i(7) tries to override the Court decision, eliminate any medical assistance prior to a determination of Medicaid eligibility, and undo the Court ordered regulation.

Add a New §36-a

- Repeals Social Services Law § 364-i(7) (added in 2013).
 - When subdivision 7 was added in 2013, it was an attempt to override the decision in *Konstantinov*. The Court subsequently held that immediate need services must be provided *despite the 2013 change*.
- The Governor's proposal (§35) adds specific language to subdivision 7 to eliminate medical assistance to meet immediate needs. By repealing this subdivision and adding the new subdivision 1-a, medical assistance would be provided for people with immediate needs while waiting for a Medicaid determination.

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