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NEW YORK STATE MEDICAID HOME CARE LAWS AND CASES^{©1}

by Ellen Yacknin, Greater Upstate Law Project, Inc. (June 1997; *updated* July 2002)
updated by Valerie Bogart, Legal Services for the Elderly (9/99; 6/02), Selfhelp
Community Services, Inc., (3/03, 10/04, 3/06, 7/06, 6/07, 6/09, 1/11)

THIS IS posted at <http://onlineresources.wnylc.com/kbbase/afile/41/24/> - check there for
updates

See <http://wnylc.com/health/16/> - Multiple articles on Medicaid home care in NYS

New York State Laws and Regulations

Home Health Care Services (CHHA)

NY Social Services Law [SSL] §§365-a(2)(d), 367-j; 18 NYCRR §505.23 and
Appendix I, 10 NYCRR §763.5

**NY' s home health care "fiscal assessment" law, implemented by 92-ADM-50
(12/1/92), expired 6/30/99*

NYS Dept of Health Scope of Tasks for Home Health Aides

http://www.health.state.ny.us/professionals/home_care/curriculum/docs/home_health_aide_scope_of_tasks.pdf

Personal Care Services (Home Attendant Services)

NY Social Services Law §§365-a(2)(e), 367-k, 367-p, 365-f(2)(e); 367-g
(Personal Emergency Response System), 18 NYCRR §505.14*

*NY' s personal care "fiscal assessment" law, implemented by 92-ADM-49
(12/1/92), expired 6/30/99*

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NYS Personal Care Aide Scope of Tasks – NYS DSS LCM 92-LCM-70 (to be posted on www.wnyc.com/health under home care services.

Private Duty Nursing Services

NY Social Services Law §§365-a(2)(l), 367-l*

NY's private duty nursing care "fiscal assessment" law expired 6/30/99

DOH 08-INF-5 (Aug. 18, 2008) - [Guide to Accessing Medicaid Private Duty Nursing Services in the Community](http://www.health.state.ny.us/health_care/medicaid/publications/docs/inf/08inf-5.pdf)
http://www.health.state.ny.us/health_care/medicaid/publications/docs/inf/08inf-5.pdf (establishes procedures for applying for nursing services and requires decisions to be made within 21 days of a fully documented application. It explains how to obtain a list of Medicaid private duty nurses in the local area by calling the Medicaid helpline at 1-800-541-2831 and online at www.homecare.nyhealth.gov. Establishes statewide procedures for obtaining Medicaid private duty nursing services if there is difficulty finding a provider. One option is to apply at the local DSS for a DOH case-specific enhanced payment rate. The enhanced rate is applicable in *all* DSS districts in the State pursuant to the Settlement.

Consumer-Directed Personal Assistance Program (CDPAP) ("CONCEPTS" in NYC)

NY Social Services Law §§367-p, 365-f; Public Health L. § 3622, subd. 10, Education Law § 6908, subd. 1(iii);

The State issued a [notice of proposed rulemaking on September 29, 2010](#), to add a new section 505.28 to 18 NYCRR, with comments due Nov. 15, 2010. No regulations have been promulgated.²

- [06 OMM/LCM-1: Questions and Answers Related to the Administration of the CDPAP](#) (amended by GIS 08-LTC-005)³
- [06 OMM/LCM-02: Consumer Directed Personal Assistance Program \(CDPAP\)](#)
- [Consumer Directed Personal Assistance Program: Clarification of 06 OMM/LCM-1, "Questions and Answers Related to Administration of the CDPAP"](#) GIS 08-LTC-005 --Clarifies that the family member or other person directing care does not have to be present at all times in which skilled nursing tasks are administered by a CDPAP aide to a non-self-

² Link to regulations and comments submitted by Selfhelp Community Services and other consumer organizations is posted at <http://wnyc.com/health/entry/40/>

³ Hyperlinks in this article are live. If online access is not available, links are in article posted at <http://wnyc.com/health/entry/40/>. Most state directives are now posted on DOH website at http://www.health.state.ny.us/health_care/medicaid/publications/index.htm

directing recipient of CDPAP. This GIS was issued as a result of litigation in Leon v. Danes, et.al., (CV 07-1674 E.D.N.Y, June 12, 2008)(available on [WNYLC Online Resource Center Benefits database](#) (with free log-in)

- [Non Medical Transportation in the Consumer Directed Personal Assistance Program](#) GIS 08-LTC-007 == CDPAP aides may drive consumer for non-medical purposes) issued as a result of litigation or threatened litigation, described in <http://www.empirejustice.org/issue-areas/civil-rights/transportation/prohibition-against.html>
- [GIS 10 LTC 005 - Consumer Directed Personal Assistance Program \(CDPAP\) Documents](#) - lists all State directives that currently apply to CDPAP in NYS as of 8/25/10

Long Term Home Health Care "Waiver" Programs see also

<http://wnylc.com/health/entry/129/>

"Long Term Home Health Care Program" or "Lombardi Program" or "Nursing Home Without Walls" Program: NY Social Services Law §366(6), 367-c, 461-1.1(d); NY Pub Health Law §§3602.8, 3616.1; 18 NYCRR §505.21; 78 ADM-70, 80 ADM-77, 83 ADM-74, 85-ADM-27, 89 INF-20, 02 OMM/ADM-4 (May 28, 2002)(Notice and Fair Hearing Procedures for the LTHHCP);

LTHHCP Reference Manual (June 2006, 219 pp.), available at:

http://www.health.state.ny.us/health_care/medicaid/reference/lthhcp

AIDS Home Care Prog. NY SSL §367-e; 18 NYCRR §505.21(a)(2); 92-ADM-25

"Katie Beckett" Waiver Program for Children: 86-ADM-4 (February 12, 1986)

Care at Home Case Management Waiver Program for Children, GIS 09 OLTC/004 (April 2009); 90-ADM-20 (May 30, 1990); 92 LCM 170; DOH manual for parents posted at

<http://www.health.state.ny.us/nysdoh/medicaid/cah/crhmngts.pdf>; Arkontaky, Adrienne, *Special Needs Forum: Waivers In New York*, NYSBA Elder Law Attorney, Fall 2008, Vol. 18 No. 4, p. 25. 2009 GIS clarifies criteria – must

- Be under the age of 18 (and not married);
- Be physically disabled, according to the SSI program criteria;
- Require the level of care provided by a skilled nursing facility or hospital, and
- Be capable of being cared for in the community safely.
- Note: Applicants no longer require a 30 day inpatient stay.

Traumatic Brain Injury (TBI) Waiver -- N.Y. Pub Health § 2740 et seq, 95 LCM-70, 96 INF-21; (HCBS/TBI) Program Manual (June 2006, 123 pp.), available at:

http://www.health.state.ny.us/health_care/medicaid/reference/tbi/docs/tbiprovider_manual.pdf; NYS DOH Directive 08-MA-024, 8/26/08 (eliminates spousal impoverishment protections for new applicants eff. 9/1/08)

Nursing Home Transition & Diversion Waiver, SSL § 366(6-a), NYS DOH Directive 08-OLTC-ADM-1, 4/28/08,

State DOH NHTDW manual posted at
http://www.health.state.ny.us/facilities/long_term_care/waiver/nhtd_manual/index.htm

Housing Subsidy Program Guide
<http://www.dhcr.state.ny.us/Forms/NHTD/nhtd.pdf>

Bridges To Health (B2H) Home and Community Based Services Waiver, eff. 1/1/08, which will provide family and community support services to 3,305 children statewide that will supplement, not replace, the existing foster care and Medicaid State Plan programs.

- <http://www.ocfs.state.ny.us/main/b2h/about.asp> - WEBSITE with FAQ, etc.
- DOH GIS 08 LTC-001 <http://www.ocfs.state.ny.us/main/b2h/GIS%20-%20Bridges%20to%20Health%20Waivers.pdf>
- <http://www.ocfs.state.ny.us/main/b2h/manual.asp> - Program Manual (7/09)
- List of approved “integration” agencies
<http://www.ocfs.state.ny.us/main/b2h/>

Home and Community-Based Services Waiver for Children with Serious Emotional Disturbance (OMH) - see links at
http://www.health.state.ny.us/health_care/medicaid/program/longterm/omh.htm
and <http://www.omh.state.ny.us/omhweb/guidance/hcbs/>

OMRDD Home and Community-Based Services (HCBS) Waiver - must be developmentally disabled and be eligible for ICF/MF level of care. SSL 366(7), 92 INF-33, 92 LCM-170, 94 LCM-24, 94 LCM-147;
http://www.health.state.ny.us/health_care/medicaid/program/longterm/omrdd.htm
<http://www.omr.state.ny.us/servicesindex.jsp>

See Evans v. Wing in State cases, below and *Status Report: Litigation Concerning Home and Community Services for People with Disabilities*, <http://www.hsri.org/index.asp?id=news>, by Human Services Research Institute (updated bi-monthly, last in June 2006)

Managed Long Term Care

See articles published in NYS Bar Association Elder Law Attorney on Managed Long Term Care, authored by David C. Silva and David Kronenberg, posted at <http://wnylc.com/health/entry/114/> (2010) – other cites to MLTC policies, manuals, contracts, contact lists of plans in NYS, etc at that link.

The Long-Term Care Integration and Financing Act (Chapter 659 of the Laws of 1997) established a regulatory framework under Article 44 of New York Public Health Law (Section 4403-f) for the integration of long-term care service delivery and alternative financing through the development of managed long-term care (MLTC) plans. This statute expired December 31, 2006. Chapter 659 consolidated, under one legislative authority, all operational managed long-term care plans in New York State at the time the legislation was enacted and authorized the development of additional plans.

Most of the MLTCPs (with the exception of the PACE organizations which are established pursuant to separate federal statute) have been required to meet additional federal requirements for managed care organizations promulgated at 42 CFR 438 under Section 1932 of Title XIX of the Social Security Act. The regulations required significant changes in a number of plan policies and procedures, especially as they relate to grievance and appeals systems, service authorization processes and performance improvement and quality assurance methods. Additional changes were required in marketing materials and activities, including member handbooks.

The enactment of final New York State regulations under Part 98 of 10 NYCRR in June 2005 also required the MLTCPs (again, with the exception of the PACE organizations) to move from their demonstration status to obtain Certificates of Authority (COA) from the Department in order to continue to operate as managed care organizations under Article 44 of the Public Health Law.

The Final Report submitted to the Legislature on Mar. 28, 2006 as required by Ch. 659 is posted at http://www.health.state.ny.us/health_care/managed_care/mltc/pdf/mltc_final_rep.pdf ..

Cases – Court Decisions and Settlements (Federal and State)

Bayon v. Novello, CV 00 7200 (EDNY Oct. 2005); Mayorga v. Novello, CV-01-6625 (EDNY) (Settlements Oct. 2005)

The settlement prohibits Suffolk County DSS from requiring that non-legally responsible friends and relatives of personal care services (PCS) a/k/a home attendant recipients provide back-up care when PCS aides do not show up or are unavailable. SCDSS must provide case management to ensure that PCS is available 24/7 as indicated on a recipient's care plan. DOH permits a higher PCS rate when necessary to facilitate hospital discharge, avoid inappropriate institutional care, and prevent health and safety risk when PCS providers are unable to fill a care plan. The settlement references a DOH letter issued during the course of the litigation to all Hospital Chief Executives describing the implications of the U.S. Supreme Court *Olmstead* decision for hospital discharge planning which requires community placements and the use of home care in lieu of institutional placements.

The settlement also ends a "seizure policy" of Suffolk County which denied PCS to anyone determined by SCDSS to have a seizure disorder. (Plaintiff Bayon, a town official who became quadriplegic after an auto accident, was forced to stay in the hospital for 9 months because home care was denied because of seizures, until his elderly mother was forced to agree to be an unpaid back-up aide so that he could go home. Plaintiff Mayorga, who has Multiple Sclerosis, could only receive home care when her elderly, frail mother agreed to be an unpaid back-up aide).

Counsel: Robert Briglio, Nassau/Suffolk Law Services, Islandia NY. (631) 232-2400 (ext 3367)

Bernard v. Novello (E.D.N.Y 00 CV 260).

Stipulation and Order signed around February 2001, in which State agreed that Long Term Home Health Care Program (LTHHCP) or Lombardi recipients are entitled to fair hearing rights when number of hours of home health, personal care, or physical therapy services are discontinued or reduced contrary to treating physician's orders. Implemented in NYS DOH Directive 02 OMM/ADM-4 (5/28/02), posted at http://www.health.state.ny.us/health_care/medicaid/publications/pub2002adm.htm

Best v. DeBuono (N. Y. Co. Supreme Ct., settled January 2001)(see Sanon below)

Burland v. Dowling, Index No. 407324\93 (Sup. Court, NY County, Order July 3, 1995, based on decision dated November 14, 1994)

Preliminary injunction requiring the state and county defendants to provide aid-continued services pending a hearing decision to all recipients of Medicaid-

funded personal care services statewide, and CHHA recipients in NYC, whose services are to be reduced or terminated based on fiscal assessment or other grounds after a temporary hospitalization. Implementation: Local Comm'r. Mem. 99-OCC-LCM-2 (4/20/99)

A motion to authorize "applicants" personal care in the amount they need, regardless of the fiscal cost, until an appropriate nursing home placement is available was pending at the time the law expired June 30, 1999. Applicants were claiming the same rights as "recipients" under the comparability provision of federal Medicaid law. The motion was marked off calendar for a year, to be reinstated if the law is re-enacted. Challenge to the inaccuracy of the fiscal cost figures was also marked off calendar.

Cassidy & Arcuri v. Novello et al., CV 02 3373 (EDNY) (Settlements Oct. 2005)

Certified Home Health Agency (CHHA) providers in Suffolk did not provide substitute aides and relied on families to provide services when aides were not located, sometimes for months on end. Some agencies simply refused to take a case, leaving those eligible for services without care or inappropriately institutionalized. The court-ordered settlement requires CHHAs to engage in region-wide cooperative efforts among themselves and with hospital discharge units to ensure a home health aide case is accepted. The policy provides for a referral to DOH when cooperative efforts are unsuccessful. The policy has been conveyed to all CHHA administrators in New York State.

In SUFFOLK County only, DOH directed the agencies to retain sufficient staff to ensure care is provided as specified in patients' care plans and that fair hearing procedures are adhered to. The agencies have been directed to provide case management, including assisting patients to obtain services from other facilities or agencies when necessary and ensuring the availability 24/7 of professional telephone consultation for patients receiving home care. The agencies must develop written policies and procedures regarding patient rights, including the provision of information for filing complaints to DOH and the availability of the DOH toll-free hotline.

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Catanzano v. Dowling – series of decisions

- Catanzano v. Dowling, 277 F.3d 99 (2001).

Agreeing with plaintiffs, the Second Circuit vacated in part and reversed in part the district court's final judgment, entered 9/2/99, that had dismissed the entire action with prejudice. The case was dismissed based on mootness because of the "sunset" of the fiscal assessment law. This was OK with plaintiffs as most

of the issues had been favorably resolved earlier (see list of earlier decisions below). But the district court had granted summary judgment on one issue that was adverse: the district court's decision precluded notice and fair hearing rights if the treating physician "agreed" with the CHHA about a reduction, denial, or termination of CHHA care. The Second Circuit vacated this part of the decision on a procedural ground - not on the merits, thereby preserving the "treating physician exception" for later litigation.

NOTE that a Medicare case was decided favorably on this issue, holding that certified home health agencies must give written notice before they reduce or terminate home health services for any reason, regardless of whether the treating physician "agrees" with the reduction. Lutwin vs. Rovner, 361 F.3d 146 (2d Cir. 2004), *affirming in part and vacating in part*, Healey v. Thompson, 186 F. Supp. 2d 105, 2001 U.S. Dist. LEXIS 23767 (D. Conn., 2001)

- Catanzano by Catanzano v. Wing, 103 F.3d 223 (2d Cir. 1996), *affirming* Catanzano by Catanzano v. Dowling, 900 F.Supp. 650 (W.D.N.Y. 1995); *on remand*, 992 F. Supp. 593 (W.D.N.Y. 1998).

Second Circuit reaffirmed its 1995 decision and district court's decisions holding that under New York's Medicaid home health care laws, Certified Home Health Agencies [CHHAs] are state actors, thereby triggering CHHAs' obligation to provide due process rights to Medicaid recipients. However, the Court remanded the question of whether the Medicaid Act's "freedom of choice" provision and regulation, 42 USC §1396a(a)(23) and 42 CFR §431.51, permit the CHHAs to refuse to comply with state-ordered aid-continuing directives and fair hearing decisions. On remand, the district court held CHHAs' may not refuse to comply with fair hearing decisions and aid continuing. Final Implementation Plan codified at 18 NYCRR §505.23 Appendix 1.

- Catanzano by Catanzano v. Dowling, 60 F.3d 113 (2d Cir. 1995), *affirming* 847 F.Supp. 1070 (W.D.N.Y. 1994).

Second Circuit affirmed district court decision that under New York's Medicaid home health care laws, Certified Home Health Agencies [CHHAs] are state actors, thereby entitling Medicaid applicants and recipients to Medicaid due process rights, including notices, hearing rights, and aid-continuing rights.

- Catanzano v. Richardson, unpublished Order (W.D.N.Y. October 17, 1989), *affirmed without opinion*, 902 F.2d 1556 (2d Cir. 1990).

District court held that recipients of Medicaid-funded home health care services are entitled to due process rights, including notices, hearings, and aid-continued services pending a fair hearing decision.

Curry v Wing, N.Y.L.J. 716 N.Y.S.2d 6, 2000 N.Y. App. Div. LEXIS 11263, N.Y.L.J. 11/14/2000 (p. 27 col. 3)(App. Div. 1st Dept. 2000)(companion case with Schlossberg)

Terrible decision in transferred Article 78. Finds notice of determination was adequate (appellant had challenged lack of specificity for why split shift was denied). Upholds hearing decision that affirms HRA's denial of increase from sleep-in to split shift. Appellant was *pro se* at the hearing, and his own physician had not specifically recommended split shift. Despite reciting new medical evidence submitted to the Court by appellant's counsel that appellant is tetraplegic and needs repositioning every 2 hours, court says it is constrained by *Kuppersmith* that agency need not follow treating physician's recommendation.

COMMENT: The court's interpretation is arguably incorrect, because *Kuppersmith* does not go that far. While *Kuppersmith* says that the agency need not defer to the treating physician's opinion of the number of hours, the treating physician is still the source for the medical condition and treatment. So the physician's opinion that the patient must be turned and positioned every 2 hours to prevent bedsores SHOULD have deference.

Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990)

Medicaid regulation limiting provision of private duty nursing care to the home violates the statute; Medicaid must provide it to child while attending school. See also *Skubel*, below (applied to Medicaid home health services).

Leon v. Danes, et.al., (CV 07-1674 E.D.N.Y, June 12, 2008)⁴ Expands access to Consumer-directed personal assistance services and Private duty nursing services.

(1) NURSING) Settlement resulted in August 18, 2008 DOH directive, DOH 08-INF-5 (Aug. 18, 2008), that establishes procedures for applying for nursing services and requires decisions to be made within 21 days of a fully documented application. It explains how to obtain a list of Medicaid private duty nurses in the local area by calling the Medicaid helpline at 1-800-541-2831 and online at www.homecare.nyhealth.gov. Establishes statewide procedures for obtaining Medicaid private duty nursing services if there is difficulty finding a provider. One option is to apply at the local DSS for a DOH case-specific enhanced payment rate. The enhanced rate is applicable in *all* DSS districts in the State pursuant to the Settlement. See DOH 2008- INF-5.

(2) CDPAP – settlement ordered issuance of DOH GIS 08 LTC-005 (9/9/08),⁵

⁴ Settlement posted on the Online Resources Center of www.wnyc.net. Registration is required to access postings, but it's free.

⁵ http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/08oltc005.pdf. The GIS was issued as the result of a settlement in *Leon v. Danes, et.al.*, (CV 07-1674 E.D.N.Y, June 12, 2008)(posted on WNYLC.net Online Resource Center)

amending DOH 06 OMM/LCM-1 (Q & A on CDPAP). Clarifies that the family member or other person directing care does *not* have to be present at all times in which skilled nursing tasks are administered by a CDPAP aide to a non-self-directing recipient of CDPAP.

Long Island Care vs. Coke, 127 S. Ct. 2339; 168 L. Ed. 2d 54; 2007 U.S. LEXIS 7717 (June 2007)

Reverses, after earlier remand, 2nd Circuit decision and upholds the federal regulation that exempted home care aides from overtime requirements of the Fair Labor Standards Act. The U.S. Supreme Court deferred to an opinion by the Dept. of Labor that home care aides should be exempt from overtime, regardless of whether they were privately hired by a family or worked for a large home care agency. Since the Second Circuit decision in 2004, finding that overtime must be paid to aides, most home care agencies cut weekly hours of individual aides to less than 40 hours per week, rather than paying overtime. In this way, the goal of the lawsuit to increase wages had backfired. It also disrupted continuity of care for clients who need high hours of care, with more aides splitting up the shifts. The Supreme Court remanded the case in June 2007 back to the Second Circuit, but given that the overtime exemption has now been declared valid, it seems this is simply a clerical procedure. But.. stay tuned.

DeLuca v. Hammons, 927 F. Supp.132 (S.D.N.Y. 1996)

Court held that state regulation imposing arbitrary 4-hour per day cap on Medicaid-funded personal care services for new applicants receiving such services for the first time violated federal Medicaid rules with respect to the provision of adequate medical care. Under a 2004 settlement, PERS will be available to HOUSEKEEPING clients as well as personal care/home attendant clients in NYC. GIS DOH 04 MA-029 clarifies that PERS may not substitute for personal care aide services. Also, no minimum number of hours or level of personal care services is required to be eligible for PERS – Housekeeping (Level I) services may qualify for PERS.

http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/04ma029.pdf

Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990)

Federal regulation limiting Medicaid-funded private duty nursing services to recipient's home, and not outside the recipient's residence, was not authorized by the Medicaid Act – must be provided to child at school. see also Skubel below.

Egan v. DeBuono, 688 N.Y.S.2d 18 (1st Dept. 1999)

In transferred Article 78 case, court affirms agency's termination of 24-hour a day personal care services based on the agency's medical directors review of the treating physicians order for continued 24-hour care, and the nursing assessments. Court rules that Olmstead's mandate to provide "appropriately integrated services" was not violated because a state is not required to make "fundamental alterations in its Medicaid program."

Evans v. Wing, 277 A.D.2d 903, 716 N.Y.S.2d 269 (4th Dept. 2000), reargument denied, 724 N.Y.S.2d 143 (4th Dept. 2001).

Court rules that although a \$50 monthly Personal Needs Allowance [PNA] for a married recipient of "Long Term Home Health Care Program" home care services is identical to the PNA for a married skilled nursing facility resident, it was an "irrational" amount because \$50 does not cover the cost of maintaining the LTHHCP participant in the community. The court remanded the action to the lower court to determine a rational PNA amount.

In GIS Message 01-MA-021 (June 28, 2001), NYS DOH advised local agencies that the PNA for married Medicaid recipients of LTHHCP services is now the difference between the Medicaid income level for a household of one and the Medicaid income level for a household of two (in 2011 = \$350)⁶.

Granato v. Dowling, 74 F.3d 406 (2d Cir. 1996)

Court held that temporarily hospitalized recipients of Medicaid-funded personal care services are entitled to aid-continued services pending a fair hearing decision when the state agency refuses to reinstate the services ordered by the recipients' treating physicians upon the recipients' discharge from the hospital. (Martin v. Wing is related issue). Implementation: Local Comm'r. Mem. 99-OCC-LCM-2 (4/20/99) <http://www.wnylc.net/pb/docs/99OCCLCM2.pdf>

Greenstein v. Perales, 833 F. Supp. 1054 (S.D.N.Y. 1993)(appeal settled, Second Modified Judgment, 2/24/95)

If Medicaid incorrectly denied a Medicaid application or delayed in processing it, Medicaid must reimburse the recipient for medical expenses paid as a result of the error or delay. 42 U.S.C. § 1396d(a), SSL § 367-a(1), 18 NYCRR 360-7.5(a)(1). 87 ADM-48. In consent judgment, the State agreed to pay reimbursement at the ACTUAL rate, rather than only at the Medicaid rate.

See [10ADM-09 - Reimbursement of Paid Medical Expenses Under 18](#)

⁶ http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/10ma026.pdf

NYCRR §360-7.5(a), posted at http://www.health.state.ny.us/health_care/medicaid/publications/pub2010adm.htm.

Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995)

Department of Public Welfare's placement of Medicaid recipient into nursing home, rather than providing her with attendant services at home for which she qualified, discriminated against her as a disabled person in violation of the Americans with Disabilities Act.

Kuppersmith v. Perales, 93 N.Y.2d 90, 688 N.Y.S.2d 96 (1999)

NY Court of Appeals upholds as within Medicaid program's discretion a state regulation, 18 NYCRR §505.14(b)(3)(i)(3), prohibiting the treating physician from prescribing a specific number of hours of personal care. The regulatory "gag rule" applies to the physician's order, which is one of several assessments used by the Medicaid program in determining the amount of home care to authorize.

The Court affirms the termination of personal care based on adverse fiscal assessment, and rejects due process and ADA claims (but pre-Olmstead).

Lupo v. Wing, CV 97-0986 (E.D.N.Y.,)

Plaintiff, represented by counsel from NSLS and the Touro Law Center, prevailed in his claim challenging the failure of the Suffolk County Department of Social Services (SCDSS) and the New York State Department of Health (NYSDOH) to permit recipients of Medicaid Personal Care Services (PCS) to go on activities of daily living performed outside the home, such as shopping and banking, with their PCS aides. Plaintiff challenged the defendants' restrictive PCS policies as violating the State Medicaid Statute and Title II of the Americans With Disabilities Act, providing for government programs and services to be offered in the least restrictive manner.

United States District Court Judge Thomas Platt ordered a stipulation of settlement in the case on February 4, 1998, pursuant to which plaintiff is permitted to go with his PCS aide on activities of daily living included on the plaintiff's PCS care plan, which include shopping, banking, haircuts, and other activities. The stipulation provides for the use of Suffolk County paratransit for the performance of activities performed by Mr. Lupo and his aide outside the home.

Lutwin v. Rovner (Medicare case - see under first Catanzano case, above)

Marion v. Balch, 252 A.D.2d 915, 676 N.Y.S.2d 712 (3rd Dept. 1998)

Although Medicaid recipient=s doctor ordered continued personal care services, court upheld agency=s decision to terminate services based on local professional director=s evaluation of doctor=s order and nursing assessments. Court ruled that there was no requirement that the “local professional director” must be a medical physician.

Martin v. Wing, 1996 WL 191974 (N.D.N.Y. 1996)

Court held that a temporarily hospitalized recipient of Medicaid-funded Home and Community Based Services under a Medicaid Waiver program was entitled to aid-continued services pending a fair hearing decision on his challenge to defendants' termination of his services upon his discharge from the hospital.

Massand v. Hammons, 662 N.Y.S.2d 754 (1st Dep't 1997)

Eye surgery services received out-of-state during 3-month pre-application period must be reimbursed, relies on decision in Seittelman, see below

Mayer v. Wing, 922 F. Supp. 902 (S.D.N.Y. 1996), modified in part, unpublished Orders (May 20 and 21, 1996); Stipulation & Order of Discontinuance (Nov. 1, 1997)

Court granted preliminary injunction and class certification finding reductions in personal care services were arbitrary and capricious and violated due process where there was no medical improvement or change in circumstances, and the reduction notices did not explain the basis for the reductions. In the final settlement in 1997, the defendants agreed for part of the preliminary injunction to remain in effect until August 2001, which limits the right of local districts statewide to reduce services except for 6 specified reasons:

- (1) a change in medical or other circumstances
- (2) a mistake that occurred in the previous authorization of services
- (3) a recipient's refusal to cooperate with the required reassessment
- (4) a technological development such as PERS rendering certain
- (5) a finding that the recipient can be more appropriately and cost-
- (6) Task-based assessment - But HRA may NOT reduce hours based

The injunction also required defendants to specify the reason for the reduction in its notice to the recipient, ordered defendants to establish a telephone line solely for processing fair hearing requests; and ordered a special aid-continuing for members of the class.

In the final settlement, the State agreed to disseminate a directive requiring districts to make two separate determinations to identify those individuals who are exempt from Task-Based Assessment. (1) the district must determine if

someone needs 24-hour care and (2) if family is available to provide some of that care. If the person needs 24-hour care, even if some of that care is provided by family, the person is a "Mayer 3" exception and is exempt from TBA. The Mayer provisions are now incorporated in revisions to 18 NYCRR 505.14(b)(5)(v), effective 11/1/01; see GIS Message 01 MA/044.

Miller v. Bernstein, Sup. Ct. N. Y. Co. Index No. 623/78, Stipulation and Settlement of Discontinuance, filed May 11, 1978 (posted at <http://wnylc.com/health/afile/34/50/>)

HRA "...shall determine an applicant's eligibility for home attendant services within 30 days from the submission ... of a properly executed physician's request..." (par. 7(a))

Muhlstein v. HRA, 865 N.Y.S.2d 647 (2nd Dept. Oct. 2008). Citing prior hearing decisions allowing reimbursement of cash paid for home care,⁷ court holds it would be arbitrary and capricious of agency to ignore these precedents. Finds the signed affidavits of the two home health care aides acknowledging receipt of cash payments should be considered on the issue of reimbursement, in light of the prior acceptance of such evidence.

Olmstead v. L.C., 527 U.S. 581, 144 L.Ed.2d 540, 119 S. Ct. 2176 (1999), affirming in part, 138 F.3d 893 (11th Cir. 1998)

Following Helen L., U.S. Supreme Court holds unnecessary institutionalization of persons with mental impairments is discrimination in violation of the ADA, requiring States to provide community-based services unless it is an "undue burden." Court recites factors but no bright-line cost test to determine if home care & other community-based services are an undue burden to the State, leaving the issue for future litigation. Court finds waiting lists for home care not per se illegal, if they move at a reasonable pace. This case considered the Brown v. Board of Ed for persons with disabilities.

Regan v. Wing (EDNY 00-CV-6245)

In Stipulation and Order, NYS DOH agrees to provide Medicaid funded personal care services to Medicaid recipients in homeless shelters and emergency shelters, and to remove the bar to such services found in 92-ADM-15 (March 27, 1992). Plaintiffs had argued that the restriction violated the Americans with Disabilities Act. The decision was implemented in NYS DOH GIS Message 02 MA/014 (6/24/02)

⁷ E.g. Matter of MG, Fair Hearing No. 3834019J (August 4, 2003, D'Andrea, ALJ)(Tonya Wong, Legal Services for New York City, rep. for appellant)(held that the home care aides' signed affidavits acknowledging receipt are sufficient proof of payment in cash)(copy of decision available on www.wnylc.net fair hearing data base).

Rivera v. DeBuono, (Sup Ct. N. Y. Co. Order, March 25, 1999)

Court rules that the agency's termination of a non-English speaking Medicaid recipient's home care based on fiscal assessment, without meaningful participation of the recipient, who had no interpreter and whose testimony at a home hearing the ALJ did not even attempt to take, is arbitrary & capricious and violates due process.

Rodriguez v. City of New York (challenges Task Based Assessment in personal care)

- *Safety monitoring issue* -- 197 F.3d 611 (2d Cir. Oct. 6, 1999), reversing Rodriguez v. DeBuono, 44 F. Supp.2d 601 (S.D.N.Y. 1999), on remand from 162 F.3d 56 (2d Cir. 1998), reversing 177 F.R.D. 143 (S.D.N.Y. 1997); petition for rehearing denied, Jan. 26, 2000, cert. denied, Oct. 2000.

Second Circuit upheld NY's policy of refusing to count "safety monitoring" as a "task" in task-based assessment. Safety monitoring is an aides supervision of a person with a cognitive impairments such as Alzheimers disease to prevent her from wandering, leaving the stove on, etc. Court held that the omission does not violate the Americans with Disabilities Act nor the federal Medicaid "comparability" provision. Citing Olmstead, the Court stated that the ADA bars discrimination only with respect to services that a state already provides, not with respect to the "separate" and "new" service of safety monitoring, which the Court found that New York does not provide. Of course plaintiffs disagree with this characterization of New York's program and of the law.

A State directive issued January 24, 2003 (GIS 03 MA/003)

<http://www.wnyc.net/pb/docs/GIS03MA003.pdf> limits the damage of this decision, stating in part:

"[D]istricts are reminded that a clear and legitimate distinction exists between safety monitoring as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed."

This GIS clarifies that districts MUST assess time need for an aide to assist a cognitively impaired person with recognized "tasks" such as toileting or ambulation even if the assistance is verbal cueing and prompting rather than hands-on care. Also, assisting someone in ambulation to prevent falling, while it does indeed enhance "safety," is not forbidden "safety monitoring" but is rather assistance with ambulation, so must be provided.

- *Task-based assessment (TBA)* The remaining claims challenging TBA were settled.
 - Statewide settlement: *Stipulation and Order of Settlement*, dated December 19, 2002 (statewide), and GIS 03 MA/003, January 24, 2003
http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/03ma003.pdf.

In addition to clarifying the safety monitoring issue, the GIS 03 MA/003 (cited above) issued under the state settlement clarifies that “The assessment process should evaluate and document when and to what degree the patient requires assistance with personal care services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night.” In addition, the GIS provides that “. . .a care plan must be developed that meets the patient=s scheduled and unscheduled day and nighttime personal care needs.”

- New York City only -- *Stipulation of Settlement and Order of Dismissal*, dated January 9, 2003

The City explicitly recognizes its obligation to authorize personal care assistance with identified *unscheduled and recurring needs* through an appropriate plan of care. Revises nurse’s assessment form and internal assessment procedures to identify the span of time during which client needs unscheduled and/or recurring assistance with toileting, ambulation and transferring.

- Nassau County - Settlement dated around March 29, 2004. County agreed to revise certain assessment forms and instructions “to identify clients with unscheduled needs (such as toileting, transferring, and/or ambulating) and/or recurring needs (such as feeding, assistance with medication, etc.) to ensure a plan of care that will meet these needs.” (Departmental Memo to all assessing and reviewing nurses and medical directors from Rita Nolan, Dir, Medical Services, dated May 24, 2004). The Task-Oriented Plan of Care now says that the recommended hours and days “must allow for unscheduled and/or recurring needs.”
- If assistance with toileting, ambulation, transferring, feeding, meal prep or assistance with meds is needed, the reviewing nurse must explain in a memorandum to the Medical Director how the total task time is sufficient to meet those needs when they occur.
 - A *Mayer* plan of care (24-hour care cases, including those where informal supports provide some care), must meet client’s needs when supports are unavailable. Plan should specify the time availability of the informal support.

No. 403296/98 and 402855/98 (Sup. Ct. N. Y. Co., Moskowitz, J.) (N.Y.L.J. Mar. 3, 2000 p. 27 col. 2)

Holds that Olmstead requires analysis of whether or not the provision of high-cost home care is an "undue burden" under the ADA, in which case the fiscal assessment limitations would violate the ADA. Requires State to analyze cost factors using Olmstead guidelines. Finds Egan not binding in light of Olmstead. Other than ADA, rejects other challenges to fiscal assessment notices and procedures.

Schlossberg v Wing, 715 N.Y.S.2d 44, 2000 N.Y. App. Div. LEXIS 11299, N.Y.L.J. 11/14/2000 (p. 27 col. 3)(App. Div. 1st Dept. 2000)

In a transferred case, First Department Appellate Division affirms a fair hearing decision that denied continuous split-shift 24-hour care. The court holds that the hearing decision was supported by substantial evidence because the agency was entitled to deference in interpreting its own regulations and the legislation under which it functions. The decision reiterates *Kuppersmith* that the agency is not required to follow treating physician's recommendation for amount of hours. Finds notice of determination was adequate (appellant had challenged lack of specificity for why split shift was denied). Refers to Curry case, decided same day.

Scholtz v. Novello et al., CV-02-4245 (E.D.N.Y.) and *Bacon v. Novello et al.*, CV-02-4244 (E.D.N.Y. 2004)(Settlements posted at <http://www.wnylc.net/onlineresources/welcome.asp?index=welcome>. DOH agreed to release GIS 02 MA 024, which permits the provision of Consumer Directed Personal Assistance Program (CDPAP) services in conjunction with Medicaid certified home health care, personal care, or nursing services in a combined care plan. DOH also agreed to release a directive to ensure better case management and supervision by private duty nursing agencies, notice to recipients of procedures to file complaints when care is inadequate, development of written emergency care plans, ensurance that nursing agencies accept and retain only those patients that can be cared for safely and appropriately and to contract with sufficient staff to meet its responsibilities. These instructions are in DOH Medicaid Update June 2004 Vol.19, No.6, "Licensed Home Care Services Agencies and Independent Providers of Private Duty Nursing Services." <http://www.health.state.ny.us/nysdoh/manicare/omm/2004/jun2004.htm#pdn>

NASSAU & SUFFOLK COUNTIES - Unique relief granted to these counties, allowing an enhanced rate when necessary because of the severity and complexity of a patient's medical condition, when the recipient will be left alone in the community in a potentially life threatening situation if authorized services are not provided, when the recipient has a severe mental or physical diagnosis making the patient hard to serve, when the recipient resides in a problematic

environment making the case difficult to serve, when the agency, despite diligent efforts, has been unable to consistently provide authorized services, and when the recipient is awaiting discharge from a hospital and no other home care services are available at the time of discharge and a higher rate would enable the patient to be discharged.

(Counsel: Robert Briglio, Nassau-Suffolk Law Services, Islandia, NY)

Seitelman v. Silverman, 601 N.Y.S.2d 391 (N.Y.Co. 1993), *aff'd*, 630 N.Y.S. 2d 296 (App. Div. 1st Dept. 1995), *modified*, 91 N.Y.2d 618, 674 N.Y.S.2d 253 (1998)

In class action certified for New York City, orders that bills of non-Medicaid providers must be reimbursed for services in the 3-month period pre-application period (and through the acceptance of the application), but only at the Medicaid rate. Case is successor to *Krieger v. Perales*, 503 N.Y.S.2d 418 (2d Dept. 1986), *aff'd*, 518 N.Y.S.2d 957 (1987), implemented in 88 ADM-31, which orders reimbursement statewide during the pre-application period, but did not deal with the types of providers.

Follow up case: Services received out-of-state during 3-month pre-application period must be reimbursed. *Massand v. Hammons*, 662 N.Y.S.2d 754 (1st Dep't 1997)(eye surgery; relies on its decision in *Seitelman*)

See 2010 ADM on Reimbursement --

http://www.health.state.ny.us/health_care/medicaid/publications/pub2010adm.htm.

Skubel v. Fuoroli, 113 F.3d 330 (2d Cir. 1997)

Federal regulation limiting Medicaid-funded home health care services to recipient's home, and not outside the recipient's residence, was not authorized by the Medicaid Act. Decision follows Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990)(same ruling applied to private duty nursing care - Medicaid must provide it to child while attending school)

PUBLICATIONS

Alene Hokenstad, [An Overview of Medicaid Long-Term Care Programs in New York](#), (Medicaid Institute at United Hospital Fund, May 2009) A comprehensive report on Medicaid long-term care programs in New York, which serve 247,000 Medicaid beneficiaries each month and account for roughly one quarter of all Medicaid spending. Care for these beneficiaries can be intensive and costly. Created to inform discussions among New York's policymakers, health care stakeholders, and community advocates, the report provides an overview of the current organization of long-term care services

under New York's Medicaid program, a September 2007 snapshot of program enrollment and associated annual spending, and a summary of the rules that govern how each program operates. The report also identifies policy options for addressing the key challenges facing the state as it looks at options to better serve New York's frail seniors and adults with physical disabilities through its 12 long-term care programs.
<http://www.uhfnyc.org/publications/880507>

[*Medicaid Managed Long Term Care in New York, Parts 1 & II*](#) -- By David Silva, Assistant Director, Selfhelp Community Services Evelyn Frank Legal Resources Program, and David Kronenberg, Goldfarb, Abrandt Salzman & Kutzin: Elder Law Attorney, Winter 2010 – Summer 2010, Vol. 20, No. 1 and 2, published by the New York State Bar Association, One Elk Street, Albany, NY 12207. (posted with permission at <http://wnylc.com/health/entry/114/>)

Medicaid Personal Care in New York City: Service Use and Spending Patterns, (Medicaid Institute at United Hospital Fund, December 2010)
<http://www.uhfnyc.org/publications/880720> -- takes two distinct looks at one group of personal care recipients, elderly dual Medicare-Medicaid beneficiaries in New York City

Medicaid Long-Term Care in New York: Variation by Region and County, (Medicaid Institute at United Hospital Fund, December 2010)
<http://www.uhfnyc.org/publications/880719> -- analyzes rates of service use and levels of spending per recipient across New York State, documenting variation by region and by county. It also examines four interrelated factors—demographics, reimbursement policies, availability of service, and local administration—to begin to explain regional variation.

Valerie Bogart, *The Recent Settlement in Rodriguez v. DeBuono -- New Standards for Task-Based Assessment in the Medicaid Personal Care Program*, NYSBA Elder Law Attorney, Vol. 13 No. 2, p. 52 (Spring 2003), also published in Greater Upstate Law Project, *Legal Services Journal*, Vol. 2003 No. 2 (April 2003)
<http://www.empirejustice.org/NewsPublications/LSJ/2003/Apr.pdf>

Valerie Bogart and Sara Meyers, *New Task-Based Assessment Standards Set for Home Care*, The Brookdale Senior Rights Report, Samuel Sadin Institute of Law/ Brookdale Center on Aging of Hunter College (March - April 2003)

Valerie Bogart, *Tips for Solving a Common Problem for Medicaid Home Care Applicants Who Need Services Pending Approval of the Application*, NYSBA Elder Law Attorney, Vol. 13 No. 3, p. 31 (Summer 2003)

Status Report: Litigation Concerning Home and Community Services for People with Disabilities, <http://www.hsri.org/index.asp?id=news>, by Human Services Research Institute (updated bi-monthly, last in June 2006)

Valerie Bogart, *Consumer-Directed Personal Assistance Program (CDPAP) Offers*

Greater Autonomy to Recipients of Home Care, New York State Bar Association Journal, Vol. 75 No.1, January 2003, p. 8 .

<http://onlineresources.wnyc.com/kbbase/afile/40/44/>

Updated list of CDPAP Agencies in NYS

<http://onlineresources.wnyc.com/kbbase/afile/40/43/>

Alfred J. Chiplin, Jr., Vicki Gottlich, Valerie Bogart, & Judith A. Stein, *Legal Issues in Securing Home Health Services Under Medicare and Medicaid*, 31 Clearinghouse Review 199 (Sept-Oct. 1997)