

NEW YORK
CITY BAR

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Mary Wakefield, PhD, RN
Administrator
Health Resources and Services Administration
U.S. Department of Health and Human Services
5600 Fishers Lane
Rockville, MD 20857

Deborah Parham Hopson, PhD, RN, FAAN
Director of HIV/AIDS Bureau
Associate Administrator
Health Resources and Services Administration
U.S. Department of Health and Human Services
5600 Fishers Lane
Rockville, MD 20857

RE: HRSA Program Services Definition for Legal Services

Dear Dr. Wakefield and Dr. Hopson:

The Special Committee on AIDS and the Social Welfare Law Committee of the Association of the Bar of the City of New York and the City Bar Justice Center are writing to express their concern over the Human Resources and Services Administration's (HRSA's) program guidance with respect to the definition of legal services funded by the Ryan White CARE Act (CARE Act).¹ The unnecessarily narrow definition of the scope of legal services adopted by HRSA, as communicated to and by the New York City Department of Health and Mental Hygiene, is depriving persons living with HIV/AIDS (PLWHAs) in New York City of crucial support services, including such fundamental legal assistance as eviction prevention, wills, immigration assistance and consumer protection. We urge you to re-examine and clarify the scope of service definition, to insure that individuals with HIV/AIDS are able to receive the legal support services they need to achieve positive medical outcomes, as authorized by the CARE Act.²

Since its founding in 1870, the Association of the Bar of the City of New York has grown to over 23,000 members and has long been committed to promoting the public good by advocating for legal reform and for adequate representation of low income people who could not otherwise afford counsel. The membership of the Association's Special Committee on AIDS

¹ 42 U.S.C. §§300ff-11 *et seq.*

² 42 U.S.C. §§300ff-14.

includes experts with comprehensive knowledge of HIV-related law and policy issues. The Social Welfare Committee of the City Bar focuses on legal and policy issues affecting the poor. The Justice Center is part of the Association of the Bar of the City of New York Fund, Inc. (“City Bar Fund”), the 501(c) (3) public service affiliate of the City Bar. The City Bar Justice Center’s mission is to leverage the resources of the New York City legal community to increase access to justice; it operates a dozen pro bono projects and assists more than 20,000 clients a year. Approximately half of those clients are helped with advice, brief services and tailored referrals through a free civil legal hotline, including a number of clients who cannot get the vital assistance they need because of the limitation on CARE Act funding for legal services.

A review of program guidance issued by HRSA defining the allowable scope of legal services reveals a disturbing narrowing of the definition from the original parameters. On February 1, 1997, HRSA promulgated Policy No.97-02 to provide guidance to grantees regarding the allowable uses of funds awarded under Titles I or II of the CARE Act. Section 2.9 of Policy No. 97-02 states:

“Funds awarded under Title I or II of the Ryan White CARE Act should not be used for any criminal defense, or for class action suits unrelated to access to services eligible for funding under the CARE Act. CARE Act funds may be used for certain legal services directly necessitated by an individual’s HIV/AIDS serostatus. These include:

- a. Preparation of Powers of Attorney, Do Not Resuscitate Orders, wills, trusts, etc.
- b. Bankruptcy proceedings, and
- c. Interventions necessary to insure access to benefits for which an individual may be eligible, including discrimination or breach of confidentiality litigation as it relates to services eligible for funding under the CARE Act.”³

This policy was reviewed and reissued by HRSA on June 1, 2000 as Program Policy Guidance No. 2. It is worth noting that this program guidance did not limit allowable services to those enumerated. The New York City Department of Health and Mental Hygiene (DOHMH) and local legal providers receiving Title I funding therefore understood this policy to permit legal services necessitated by an individual’s HIV/AIDS serostatus which included but were not limited to those enumerated. This interpretation was reasonable given the requirement that allocation of CARE Act funds and services within the Eligible Metropolitan Area (EMA) must be made in accordance with priorities established pursuant to 42 U.S.C. §300ff-12(b)(4)(C) by the local HIV health services planning council, which is best equipped to determine local needs affecting access to and maintenance of care by PLWHAs.

In January, 2006, legal providers in New York City receiving CARE Act funds were informed by DOHMH that housing and immigration, as well as certain other legal matters, were no longer allowable services under the CARE Act, according to HRSA. In response to this sudden restriction of the scope of legal services, the New York HIV Planning Council passed a resolution in February, 2006, directing the Commissioner of DOHMH to ask HRSA for clarification of the policy defining allowable scope of legal services.

³ HRSA Policy No. 97-02 (emphasis supplied).

Dr. Scott Kellerman, the Assistant Commissioner of DOHMH, subsequently wrote to Douglas Morgan, the Director of the Division of Service Systems at HRSA, indicating that DOHMH considered housing eviction prevention to be within the scope of allowable legal services under HRSA's Program Policy Guidance and requesting re-evaluation of the interpretation of HRSA/HAB policy regarding prohibition of legal services for PLWHAs needing immigration legal assistance. (Copy of Kellerman letter to Morgan dated April 20, 2006, attached.)

The response from Director Morgan was significant in that it did not advise DOHMH that Program Policy No. 2 permitted the EMA to determine whether legal services other than those enumerated in Section 2.9 could be provided. Instead, Director Morgan restated the policy as restricting use of CARE Act funds to legal matters "which address issues directly related to the client's HIV-positive serostatus, specifically preparation of Powers of Attorney, Do Not Resuscitate Orders, wills, trusts, etc., bankruptcy proceedings, and interventions necessary to ensure access to benefits for which an individual may be eligible, including discrimination or breach of confidentiality litigation as it relates to services eligible for funding under the CARE Act", and adding "...we see no compelling reason to broaden the use of CARE Act dollars for legal assistance beyond those contained in our existing Policy." (Emphasis supplied.) (Copy of letter from Douglas Morgan to Scott Kellerman dated May 19, 2006, attached.)

The 2006 response from Director Morgan refusing to "broaden" the definition of permissible legal services in fact constituted a significant narrowing of HRSA's definition, as it was understood by legal providers in the New York EMA and DOHMH. The definition was narrowed further in February, 2009, when HRSA issued instructions to grantees defining the acceptable scope of services as follows:

"Legal services are the provision of services to individuals with respect to powers of attorney, do-not-resuscitate orders and interventions necessary to ensure access to eligible benefits, including discrimination or breach of confidentiality litigation as it relates to services eligible for funding under the Ryan White HIV/AIDS Program. It does **not** include any legal services that arrange for guardianship or adoption of children after the death of their normal caregiver."

Pursuant to this new guidance, legal providers receiving CARE Act funding in New York City were advised that they could no longer assist PLWHAs with wills, trusts, bankruptcy proceedings or future care and custody planning for their minor children.

On April 10, 2010, the HIV/AIDS Bureau of HRSA released Policy Notice 10-02 describing the allowable uses of CARE Act funds. This guidance reiterated the proscription of criminal defense or class action suits unrelated to access to services eligible for funding under the CARE Act. It further stated that funds may be used for legal services directly necessitated by the individual's HI/AIDS serostatus, which include:

"a. Preparation of Powers of Attorney, Living Wills

- b. Interventions necessary to ensure access to eligible benefits, including discrimination or breach of confidentiality litigation as it relates to services eligible for funding under the Ryan White HIV/AIDS Program, and
- c. Permanency planning for an individual or family where the responsible adult is expected to pre-decease a dependent (usually a minor child) due to HIV/AIDS; includes the provision of social service counseling or legal counsel regarding (1) the drafting of wills or delegating powers of attorney, and (2) preparation for custody options for legal dependents including standby guardianship, joint custody or adoption.”

While this guidance does loosen the restrictions on legal services eligible for funding to the extent of permitting some permanency planning, it is silent with respect to myriad other legal issues which may negatively impact the health of PLWHAs if not resolved, such as housing, consumer/bankruptcy, family, and immigration.

In New York City, DOHMH has interpreted this guidance as permitting only the services listed in Policy Notice 10-02, and no others. In a letter dated June 7, 2010, DOHMH instructed legal providers that CARE Act funds cannot be used for landlord/tenant proceedings unless the proceeding is directly related to discrimination due to HIV, or the denial of HIV related housing benefits; family violence proceedings unless directly related to an individual’s HIV status; or immigration-related activities.

These restrictions prohibit services which are absolutely critical support for PLWHAs. For example, data shows that “there is a significant relationship between homelessness/unstable housing and remaining outside of or marginal to HIV care.”⁴ PLWHAs who receive meaningful housing assistance are “almost four times more likely to enter into medical care...and twice as likely to enter into and continue in care that meets current clinical standards for treatment of HIV/AIDS.”⁵ Through eviction prevention and housing advocacy services, legal providers remove very real, concrete barriers to primary care (unstable housing/risk of homelessness) for an already at-risk population.

Ongoing immediate needs such as housing often take precedence over healthcare. Data from the CHAIN Study show that “there is a significant relationship between homelessness/unstable housing and remaining outside of or marginal to HIV care.”⁶ The current

⁴ Community Health Advisory and Information Network (CHAIN Study), Columbia University School of Public Health, Overview, p. 15, 2000. *See also* White House Office of National AIDS Policy, *National HIV/ AIDS Strategy for the United States* ix (2010), available at <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf> at 28 (“Access to housing is an important precursor to getting many people into a stable treatment regimen. Individuals living with HIV who lack stable housing are more likely to delay HIV care, have poorer access to regular care, are less likely to receive optimal antiretroviral therapy, and are less likely to adhere to therapy”).

⁵ Angela Aidala, PhD, Natasha Davis, MSW, David Abramson, MPH, and Gunjeong Lee, MPhil, *Housing and Health Care Among Persons with HIV/AIDS*, presented at the 130th meeting of the American Public Health Association, 2002 (Abstract #47702). Relying on data from the CHAIN Study for 1995-2000, these researchers also concluded that people with housing needs who receive “practical housing assistance are almost four times more likely to enter into medical care..., and twice as likely to enter into and continue in care that meets current clinical standards for treatment of HIV/AIDS.” *Id.*

⁶ CHAIN Study, footnote 4, *supra*.

shortage of existing low-income housing demands that, whenever possible, people remain housed in the first instance. A study of the impact of legal counsel for poor tenants in New York City's Housing Court showed that having an attorney produces large differences in outcomes for low income tenants, independent of the merits of the case.⁷

In addition to eviction prevention, domestic violence cases (regardless of whether there is documentation of abuse based on the victim's HIV status) and immigration services (including any services to assist undocumented immigrants with obtaining legal status in order to access medical care) have also been prohibited based on the restrictive policy guidance promulgated by HRSA.

An increasing number of NYC residents living with HIV/AIDS need assistance with a range of immigration issues to remove barriers to care. In an April 18, 2002 report on community forums sponsored by the HIV Health and Human Services Planning Council of New York, the target population of immigrants was specifically mentioned as having unmet service needs. The summary stated that "participants noted that legal services are increasingly overwhelmed and have waiting lists to access an attorney. There is an increasing need for legal counsel on immigration issues."⁸ Undocumented immigrants have access to a very limited range of benefits and services, and struggle to support themselves and their families. Health care is a lower priority than basic survival. Legal services are needed to assist these individuals in filing petitions with the United States Citizenship and Immigrant Services for legal status, which permits them to receive the range of assistance to secure housing, food, and other government benefits. Without securing such basic needs, new and recent immigrants with HIV/AIDS are at higher risk of remaining outside of or marginal to the HIV care system and are much more likely to rely on hospital emergency room visits as a source of primary care.⁹

General legal services funding – which itself is inadequate – cannot fill this gap. For instance, Legal Services NYC already turns away over 80% of clients seeking legal assistance. A survey conducted by The Legal Aid Society found that it could only serve one out of every nine individuals seeking legal assistance in civil matters.

The Special Committee on AIDS and the Social Welfare Law Committee of the Association of the Bar of the City of New York and the City Bar Justice Center believe that HRSA has narrowed the definition of the scope of legal services which may be funded under the CARE Act in a way that does not serve the purpose of the statute or the needs of PLWHAs. HIV-positive individuals are more likely to face administrative and court eviction proceedings, family disputes, debt collection matters, immigration, wills, and other legal issues due to their HIV status, and these issues pose significant impediments to their access and maintenance in care. HRSA should review and revise its guidance to CARE Act grantees to allow them to

⁷ Carol Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law and Society Review 419 (2001).

⁸ Memorandum, dated April 18, 2002, from Errol A. Chin-Loy, Governmental Co-Chair, on community forums sponsored by the Planning Council. That report also noted that "[p]ermanency planning is a major need and concern." *Id.*

⁹ "Welfare Reform and Health Care: The Wrong Prescription for Immigrants," New York Immigration Coalition, November 2000 (*Based on research by: Solutions for Progress, Inc.*).

determine how best to provide legal services which insure medical outcomes, as its original guidance did.

Bebe J. Anderson
Chair, AIDS Committee

Brooke Richie
Chair, Social Welfare Law Committee

Lynn Kelly
Executive Director, City Bar Justice Center

Enc.

cc w/ enc.:

Thomas A. Farley, MD, MPH, Commissioner of New York City Department of Health and Mental Hygiene