



**NEW YORK
CITY BAR**

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**REPORT ON LEGISLATION BY THE
LEGAL PROBLEMS OF THE AGING COMMITTEE**

A.4996

M. of A. Gottfried

AN ACT to amend the social services law and the public health law, in relation to Medicaid reviews and appeals

THIS BILL IS APPROVED

The Legal Problems of the Aging Committee of the New York City Bar Association supports bill A.4996, introduced by Assemblyman Richard Gottfried, which proposes to amend Social Services Law § 22 and Public Health Law § 4403-F as well as Social Services Law § 365-a. The bill seeks to secure certain due process rights in fair hearings for Medicaid applicants and recipients in regard to the decisions made about their care by private Managed Long Term Care plans (MLTCs). Currently, the State's contracts with these organizations abrogate certain rights that were inherent in the fee-for-service Medicaid system. Although the State Medicaid plan has switched to mandatory managed care for long-term-care services, the Committee believes that the Medicaid recipients of this State should continue to receive protection from arbitrary changes in care that they have had for decades. There are two areas of concern: (1) the right to request a hearing without first complying with internal appeals conducted by the MLTCs, and (2) the right to receive continued services ("aid continuing") pending a hearing when a plan reduces or discontinues services.

INTERNAL APPEALS

Currently, MLTC consumers must exhaust an internal appeal process with their plans before requesting State administrative hearings to challenge decisions about their care. This added step was not required under fee-for-service Medicaid. The Committee believes this step, if mandatory, adds potentially harmful delay. Accordingly, we support Section 1 of the bill, which eliminates the requirement to exhaust the administrative appeal process and would allow a recipient to request a fair hearing prior to the exhaustion of an internal review and appeal process with the Managed Long Term Care (MLTC) plan.

The need to exhaust the internal appeal process makes an already stressful process unnecessarily complex. MLTC home care recipients can become confused about their hearing rights and unwittingly miss the deadline to request a hearing because they thought their internal appeal was sufficient to preserve their rights. Many recipients have been moved into an MLTC plan after years in fee-for-service care and do not understand that the plans impose the additional step in the appeals process. Fair hearings are being denied because the internal review was not

exhausted and recipients learn that the time in which they can seek a review has elapsed, effectively stripping them of their right to appeal a determination.

Enactment of this Section would guarantee that both internal reviews and traditional fair hearing rights are available to recipients concurrently without a requirement that one precede the other.

AID CONTINUING

We also support Sections 2 and 3 of the bill, which seek to clarify the right of Medicaid recipients to receive, and the obligation of the MLTC to provide, “aid continuing” through the determination of an appeal. The Due Process clause of the Fourteenth Amendment guarantees the right to pre-termination hearings for certain government benefits. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). These rights have been recognized for Medicaid long-term-care recipients by the federal courts in this jurisdiction for many years (*Mayer v. Wing*, 922 F.Supp. 902, 905 (S.D.N.Y.1996)). However, certain federal regulations permit states to contract for managed care services without providing traditional aid continuing when plans make changes in care.

The Legislature previously enacted an override that gave New Yorkers increased protection: Section 365-a(8) of the Social Services Law (SSL), which requires private agencies that contract with the State and have the authority to authorize services to provide the same due process rights to the recipient, including a right to a fair hearing and aid continuing as would have been provided if the State had directly authorized services. The current Department of Health (DOH) Policy has unlawfully eviscerated the right to “aid continuing” by ignoring SSL § 365-a (8).

The current policy articulated by DOH allows MLTC plans to terminate or reduce hours of home care services without affording the affected recipients the right to continue to receive services while an appeal is pending if the appeal takes longer than the previously-authorized period for these services. For the most part, both in the previous system as well as with MLTC plans, services are authorized in six-month increments. The appeal process in most cases takes longer than the authorization period especially if the determination is made in the later part of the 6-month authorization period.

The right to receive services pending a hearing could be life saving for many of our clients, who are often among the frailest and most in need of the continued services. Section 2 clarifies the application of 365-a (8) to MLTC plans, requiring that services must continue through the pendency of an appeal regardless of the expiration of any previously authorized time periods.

It is for these reasons that the Legal Problems of the Aging Committee of the New York City Bar Association supports A.4996.

Judith D, Grimaldi
Chair of Legal Problems of the Aging Committee

March 2013