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¦ LOCAL COMMISSIONERS MEMORANDUM ¦
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DSS-4037EL (Rev. 9/89)

Transmittal No: 95 LCM-76

Date: July 18, 1995

Division: Health and Long Term Care

TO: Local District Commissioners

SUBJECT: Continuous Care Case Review;
Personal Care Services Program
Burland TRO; and Statements of Understanding

ATTACHMENTS: SSL 367-p(b) - [available on-line]

In an effort to deliver Medicaid funded home care services in an efficient, more cost effective manner while continuing to provide necessary services, the Legislature has extended Social Services Law (SSL) Section 367-k, which governs fiscal assessments of personal care services applicants and recipients, until July 1, 1997, and has added SSL Section 367-p. The purpose of this memorandum is to inform the social services districts of the provisions contained in part (b) of SSL 367-p and remind them of the continued applicability of the Burland v. Dowling temporary restraining order (TRO) and of the proper use of "statements of understanding" in the fiscal assessment process.

I. SSL Section 367-p(b): review of continuous care cases:

Pursuant to Section 367-p(b), all districts must, by September 1, 1995, review the plan of care for each personal care services (PCS) recipient in receipt of continuous care. Continuous care is the delivery of 24 hour uninterrupted personal care by more than one person. In order to fulfill these requirements, the case review must be made in accordance with the instructions contained in 92 ADM-49, Fiscal Assessment and Management of

Personal Care Services. Districts are directed to consider all available and appropriate efficiencies and, for continuous care recipients whose plan of care continues to exceed 90 percent of the cost of residential health care facility (RHCF) services, to determine whether such recipients continue to meet at least one exception criterion. Districts will not be required to conduct such review for continuous care cases which were reauthorized within the last six months provided such reauthorization included fiscal assessment, consideration of efficiencies and a review of continued validity of any exception criteria.

It is recommended that each district maintain a record of the reviews and the action taken in accordance with SSL Section 367-p(b).

II. Reminder regarding Burland temporary restraining order:

Until further notice from the Department, districts are reminded that the temporary restraining order (TRO) issued on January 5, 1994, in Burland et al. v. Dowling et al. (Supreme Court, New York County) remains in effect. Until further notice, this TRO affects the fair hearing notices that social services districts must send to hospitalized recipients who received personal care services immediately prior to entering the hospital when districts determine that the recipient's personal care services should be reduced or discontinued after discharge from the hospital.

The Department advised all social services districts of the Burland TRO by a GIS message sent on January 7, 1994. To summarize, recipients who are hospitalized must be appropriately notified that his/her services have been suspended, either through use of the DSS-4009, "Notice of Decision to Suspend the Authorization for Personal Care Services," or an approved local equivalent notice. When a district reassesses the recipient prior to discharge, the district must complete a fiscal assessment, consider all available and appropriate efficiencies and, if the plan of care continues to exceed the fiscal threshold, determine whether the recipient meets any exception criteria. When the district determines that the recipient's services should be reduced or discontinued, the district must follow the notice procedures contained in the January 7, 1994 GIS message and send the recipient the DSS-4008, the "Notice of Intent to Increase, Reduce, or Discontinue Personal Care Services", or the approved local equivalent.

When a social services district assesses a recipient in the hospital and determines that the recipient should be discharged home with a higher level of personal care services or with more hours of personal care services than he/she received prior to being hospitalized, the social services district should continue to follow existing notice procedures. Under these procedures, the district sends the recipient the DSS-4007, the "Notice of Initial Authorization/Reauthorization or Denial of Personal Care Services", or an approved local equivalent.

III. Statements of Understanding:

As described in 92 ADM-49, when the social services district determines that an MA recipient's home care costs exceed 90 percent of RHCF costs, the district must determine whether the recipient meets at least one exception criterion. When the recipient meets no exception criteria, the district must refer him/her to RHCF placement or other appropriate long-term care services and provide the recipient with the appropriate hearing notice and an opportunity for a fair hearing with, if required, aid-continuing.

Before referring the recipient to RHCF or other care, a social services district should discuss the consequences of the adverse fiscal assessment, including the recipient's right to request a fair hearing, with the recipient and the recipient's potential informal supports. Such persons may want to help keep the recipient at home and avert his/her placement in an RHCF or other setting. To that end, they may be willing and able to supplement the recipient's care, either by voluntarily agreeing to pay privately for some personal care services or by voluntarily agreeing to provide care directly to the recipient for a certain number of hours per day or week.

The willingness of the informal support to assist with the recipient's care may reduce the cost of the MA-funded home care to 90 percent or less of RHCF costs. As a result, the recipient would be eligible to receive personal care services and he/she would be able to remain safely at home with a combination of MA-funded personal care services and assistance voluntarily provided or paid for by his/her informal support.

In such cases, it can be helpful to clarify the respective roles of the social services district and the informal supports who have volunteered to assist with the recipient's care. One mechanism that some social services districts employ for this purpose are so-called "statements of understanding." The purpose of such a written document is to assure that the informal supports fully understand and accept the responsibilities for the recipient's care that they have voluntarily agreed to perform.

The Department neither requires nor prohibits the use of "statements of understanding" in the fiscal assessment process. However, the Department reminds social services districts that choose to use such statements of the following requirements governing their use:

1. Districts must first follow all of the fiscal assessment requirements:

   Social services districts are reminded that they must follow the fiscal assessment process set forth in 92 ADM-49 and 18 NYCRR 505.14 before discussing the option of a "statement of understanding" with any potential informal support.

   In particular, districts are reminded that they must apply the exception criteria to each recipient whose home care costs exceed 90 percent of

RHCF costs. When the district determines that the recipient does not meet at least one exception criterion, the district should discuss the consequences of the adverse fiscal assessment determination with the family, including the recipient's right to request a fair hearing to review the adverse fiscal assessment determination, before inquiring whether the family may be willing to assist with the recipient's care.

2. "Statements of understanding" are voluntary and must not be coerced in any way:

   Social services districts are reminded that they must not require any relative or friend or other informal support of the MA recipient to assist with the recipient's care. Nor may districts require any informal support to sign any "statement of understanding" that such person is reluctant or unwilling to sign.

   A family member or other informal support who has signed a "statement of understanding" may determine at any time that he or she is no longer willing or able to assist with the recipient's care. The "statement of understanding" is not a contract, and social services districts must not seek to enforce its terms against any family member or other person who has signed it.

Finally, no "statement of understanding" may state or imply that the district will deny or discontinue personal care services unless the informal support signs the statement. Such language could be interpreted as pressuring the recipient's supports to sign the statement; consequently, districts must avoid all such coercive language if they choose to use "statements of understanding."

If you have any questions about the content of this memorandum, you may contact the Bureau of Long Term Care's Personal Care Services Program field monitors, Marcia Anderson, Priscilla Ferry, George Fleury or Margaret Willard of the Monitoring Unit at 1-800-343-8859, extension 3-5602, 3-5498, 3-8269 or 3-5569 respectively.

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Richard T. Cody
Deputy Commissioner

Section 367-p (b) each local district shall, by September first, nineteen hundred ninety-five, review that plan of care for every recipient receiving personal care on a continuous basis pursuant to sections three hundred sixty-seven-k and three hundred sixty-seven-l of this title;