

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #1, Exhibit A

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

10/14/14

Exhibit A submitted on 11/4/14

Comment

1.A. Section 50961(c) Estate Claims—Notice to Beneficiary of Recovery of Payments to Managed Care Premiums

We recommend that the following sentence be added to the end of this paragraph reading: Recovery of payments to managed care plans shall be made only for payments made after the Department has provided a separate notice to the beneficiary that explains that the premium payments made to the managed care organization will be included either in whole or in part in the claim against the beneficiary's estate.

Such language is required by CMS in its State Medicaid Manual, transmittal No. 75 (Jan.11, 2001), Part 3 (Eligibility), §3810(A)(6), p. 3-9-5.

Response

1.A. The language proposed by the commenter limits recovery to those payments made after notice to the beneficiary. Section 1396p of Title 42 United States Code and Welfare and Institutions (W&I) Code Section 14009.5 require that estate recovery apply to all Medicaid paid services included for collection in the State Plan, not limited to those after notice is provided. Pursuant to the State Medicaid Manual (SMM) – Part 3, § 3810(A)(6), Page 3-9-5, states are required to send a notice to the beneficiary upon enrollment, explaining that the premium payments made to a managed care organization are included either in whole or in part in the claim against the estate. There is no requirement in the SMM stating that this language be added to state regulations.

The Department sends notification of the Estate Recovery program to beneficiaries when they are enrolled in a managed care plan. When a beneficiary is deemed eligible in a county where they are automatically enrolled in a County Organized Health System (COHS), the COHS beneficiary is sent notice in an enrollment packet regarding estate recovery. The Department also mails a notice at least once a year to all Medi-Cal head of households, which explains the Estate Recovery program and specifies that the State will collect from the estate “the cost of Medi-Cal services received, including insurance premiums and payments to managed care plans.” This subsection was not amended based on comment.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #1, Exhibit A

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

10/14/14

Exhibit A submitted on 11/4/14

Comment

1.B. Section 50961(d) Estate Claims—Exemption vs. Deferral

We recommend that the language, “An exemption from or deferral of” be deleted and that this section should read “ The Department shall not make a claim in any of the following circumstances:”

This complies with the state statute, Welfare and Institutions Code § 14009.5, which reads: “*The Department may not claim in any of the following circumstances:*” Varying the language from the authorizing statute is seldom justified because it leads readers to believe that something different is intended and so gives rise to controversy and dispute. The statute nowhere makes reference to “exemptions” or “deferrals.” These are new concepts imposed by the Department, and may not be “non-substantive” as claimed.

Response

1.B. In consideration of this comment and upon further review, this subsection was partially amended through a 15-Day Public Availability, published on July 15, 2015. The Department has removed the term “deferral” for clarity and consistency of terms. Amendments have been made to Section 50961(d) to read, “An exemption from the Department’s claim exists in any of the following circumstances.” Amendments were not made to remove the term exemption. W&I Code Section 14009.5(b) provides for an exemption of the claim under certain circumstances as set forth in this statute. Furthermore, the term “exemption” is used in Title 22, California Code of Regulations, Sections 50961 and 50966, entitled, “Claim Exemption.”

Consistent with this change, further amendments were made – subsection (f) was minimally amended for flow and redesignated to subsection (d)(3) since the Department shall not claim under this circumstance as well. As a result, existing subsections (d)(3) and (d)(4) have been redesignated to subsections (d)(4) and (d)(5) and subsections (f) through (l) have been redesignated as well.

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Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

10/14/14

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Comment

1.C. Section 50961(d) Estate Claims—Surviving Spouse

We believe that the phrase, “in accordance with,” is extremely ambiguous. The last sentence should be amended to reflect the statutory authority more clearly, by reading, “However, upon the death of the surviving spouse, the Department shall assert its claim against the estate of the surviving spouse (but only to the extent of property received by the surviving spouse from the decedent spouse), in accordance with subsections (a), (b), and (c) of this section.”

Response

1.C. This subsection was not amended based on comment.

Existing Section 50961(d)(2) clearly describes the Department’s process in the waiver of a claim for a surviving spouse. The phrase “in accordance with” accurately leads the reader to subsections (a), (b) and (c), that are relevant to the estate recovery process.

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10/14/14

Exhibit A submitted on 11/4/14

Comment

1.D. Section 50961(d)(1) Estate Claims—Under Age 55

We suggest that this section be amended to read:

Where the decedent was under age 55 when the services were provided, unless the decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and who has been determined, after notice and opportunity for a hearing, to be permanently institutionalized.

The Department's regulations indicate that it can recover for benefits paid from those under age 55 simply because they were inpatients in a nursing facility, intermediate care facility for the mentally retarded or other medical institutions. However, the state has no authority to recover from those beneficiaries who were under age 55 when benefits were received, unless that individual has been determined to be permanently institutionalized. (42 USC 1396p(a).) There is no other federal authority for recovery from those under age 55. As it is, the Department's policies and these regulations are contrary to federal law, and so ultimately unenforceable.

The definition of "permanently institutionalized individual" and the instructions for the process that states must use to determine whether or not a permanently institutionalized individual cannot reasonably be expected to return home are included in State Medicaid Manual (SMM) Section 3810, p. 3-9-3, which instructs the states to include this process in their State plan. This State Manual Section (p. 3-9-5) also includes detailed instructions that states are required to follow in the case of TEFRA liens, including the requirement that any lien imposed on those affected must be dissolved when the individual is discharged from the medical institution and returns home.

Response

1.D. In consideration of this comment and upon further review, this subsection was amended through a 15-Day Public Availability, published on July 15, 2015. Amendments are made to Section 50961(d)(1) and further clarified by newly added subsections (d)(1)(A) and (d)(1)(B). Subsection (d)(1) now reads "Where the decedent was under age 55 when the Medi-Cal services, as specified in subsection (c), were received, except if the individual is/was an inpatient in a nursing facility, intermediate care facility for individuals with intellectual disabilities, or other medical institution, and both of the following conditions are met:" Section 50961(d)(1)(A) states, "The provisions under Title 22, California Code of Regulations, Section 50428 apply to the individual; and Section 50961(d)(1)(B), states, "The individual spends for costs of medical care all but a minimal amount of his/her income required for personal needs." The changes are consistent with collections on permanently institutionalized individuals as described in 42 USC 1396p(a), SMM, Section 3810 and State Plan (TN No. 01-002, 4.17(a); TN No. 10-009, 4.17(b); TN No. 94-031, 4.17(c); TN No. 06-011, Attachment 4.17-A and TN No. 06-011, Attachment 4.17-D). The referenced section of Title 22, California Code of Regulations, Section 50428, further describes that the Department may not file a lien on an institutionalized individual's property unless the individual has received a Notice of Action, has an opportunity for a county level review and state hearing, and the individual states that they do not intend to return to the principal residence.

Refer to the "Summary of Additional Changes" (page 4) of the Notice of Additional Changes to the Text of the Proposed Regulations.

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COMMENT LETTER #1, Exhibit A

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

10/14/14

Exhibit A submitted on 11/4/14

Comment

1.E. Section 50961(f) Estate Claims—Waiver vs. Deferral

There is no authority for the proposed regulation. The statute provides for “waiver,” not deferral.” W&I Code Section 14009.5(c)(1) states, “The department shall *waive* is claim, in whole or in part, if it determines that enforcement of the claim would result in substantial hardship....” The proposed language exceeds the statutory authority and is unenforceable.

Response

1.E. In consideration of this comment and upon further review, this subsection was amended through a 15-Day Public Availability, published on July 15, 2015. The phrase “the Department shall defer collection of the entire claim” is removed and not included with this provision, as it is proposed to be relocated to subsection (d)(3).

For further information, see Response 1.B.

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COMMENT LETTER #1, Exhibit A

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

10/14/14

Exhibit A submitted on 11/4/14

Comment

1.F. Section 50963(a) Substantial Hardship Waiver

We suggest that this language be changed to read:

(a) The Department shall waive the applicant’s proportionate share of the claim if the applicant can demonstrate through adequate documentation or submission of an ~~written, completed~~ Application for Hardship Waiver, form DHCS 6195 (8/075-11),...

Submission of a “written, completed” hardship application is not applicable to several of the hardship criteria, including 50963(a)(3), (4) and (5). These criteria require other documentation that is relevant to the hardship in question.

It is little wonder that the Department is so far behind in determining hardship waivers, since they insist that applicants submit irrelevant information and documentation that is not applicable to their hardship request. The information request on the application should be specific to the applicable hardship criteria.

The Hardship application itself reads: “...failure to completely and accurately provide the information may result in denial of the waiver application.” Again, this is not compatible with the regulations that require the Department “**shall**” waive the applicant’s proportionate share of the claim if one or more of the following factors apply:”

If, for example, the applicant can demonstrate that he is aged, has lived continuously in the decedent’s home for at least one year prior to decedent’s death, continues to live in the home, is unable to obtain financing to repay the State, and he submits a denial letter from a financial institution – he meets the criteria of §50963(a)(3) and the State is mandated to waive the claim, regardless of whether the Hardship Application is “completely and accurately” done.

Why is the Department insisting on a “one size fits all” hardship application that leads to confusion for the applicants, extra work for the Collection Representatives, delays for the Department in resolving hardship determinations and masses of useless paper?

Response

1.F. The Department requires completion of the Application for Hardship Waiver – (Form DHCS 6195) for consistency, to ensure that certain facts are documented for all applicants, and to circumvent any form of fraud against the Medi-Cal program. The Department agrees that the submission of the minimum necessary information should be required to make a determination of hardship.

In consideration of this comment and upon further review, this subsection was partially amended through a 15-Day Public Availability published on July 15, 2015, for purposes of clarity and to ensure only necessary and applicable information is required to be submitted. This amendment specifically adds that the applicant shall demonstrate a substantial hardship through “submission of an Application for Hardship Waiver, form DHCS 6195 and documentation to substantiate hardship....” Additional amendments are made to the form DHCS 6195 (05/15) to require submission of documentation to substantiate a hardship.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #1, Exhibit A

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

10/14/14

Exhibit A submitted on 11/4/14

Comment

1.G. 50963(f) Substantial Hardship Waiver—90-Day Timeframe

We strongly recommend retaining the current language “..within 90 days of the application’s submission.”

Federal law requires states to establish procedures for determining when to waive recovery because of hardship, “in accordance with standards specified by the Secretary” of the U.S. Department of Health and Human Services (HHS); the criteria upon which hardship would be determined are also to be established by HHS (42 U.S.C. §1396p(b)(3). The criteria included in State Medicaid Manual (SMM) Section 3810, p. 3-9-7 established by the Secretary specifies as follows:

You must adopt procedures under which individuals who will be affected by recovery of amounts of medical assistance will have the right to apply for an undue hardship waiver. These procedures must, at a minimum, provide for advance notice of any proposed recovery. They must also specify the method for applying for a waiver, the hearing and appeal rights, and the time frames involved. (Emphasis added)

The House of Representatives Report accompanying the estate recovery amendments specified that in developing hardship standards, HHS must address (1) the adequacy of notice to, and representation of, affected parties; (2) the timeliness of the process; and (3) the availability of appeals. H. Rep. No. 111, 103rd Cong, 1st Sess. (1993), at 209; found in 1993 U.S.C.C.A.N.536.

The elimination of any timeline for determining hardship requests is contrary to federal law, subverts due process and will, in itself, cause undue hardship. Heirs and survivors of deceased beneficiaries will not be able to settle estates until the hardship determination is made. This could take up to three years, creating havoc in trusts and estate settlement procedures. The Department’s excuse that the deletion of the time limit “causes to no harm to applicants” is erroneous, as such a deletion will cause extraordinary harm to applicants.

Response

1.G. In consideration of this comment and upon further review, this subsection was amended through a 15-Day Public Availability, published on July 15, 2015. The 90-day timeframe for the Department to provide a decision regarding the hardship waiver application has been retained with a minor amendment for sentence flow.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #2

Kevin Urbatsch, National Director on behalf of Academy of Special Needs Planners

10/20/14

Comment

2.A. – 2.G. All comments submitted in Comment Letter #2 are identical to those submitted in Comment Letter #1.

Response

2.A. – 2.G. Please see Responses 1.A .-1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #3

Maria P. Van de Berg

10/21/14

Comment

3.A. Estate Recovery

Regarding the proposal of Estate recovery including pension house Ira and it seems everything we have saved for and worked for is going to be gone my Children will not get anything? .if any thing is left? After my husband passes away with Alz? I can not believe this is going to happen, I am doing my utmost to take care of him myself as I am doing for the last 8/10 years I strongly urge you not to let this happen.

Response

3.A. Medi-Cal is a public welfare program funded through state and federal tax dollars. Federal law, Title 42 USC, Section 1396p, and state law, W&I Code Section 14009.5, require that the State seek recovery from the estates of deceased Medi-Cal beneficiaries for services received on or after the individual's 55th birthday. The Department's claim is made against the value of the estate assets and will never exceed the value of the estate assets or the cost of benefits paid by Medi-Cal, whichever is less. Under certain circumstances, as specified under W&I Code Section 14009.5 (b) and (c), the Department may not assert a claim or will waive it.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #4

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

10/24/14

Comment

4.A. – 4.G. All comments submitted in Comment Letter #4 are identical to those submitted in Comment Letter #1. Please see Comments 1.A.-1.G.

Response

4.A. – 4.G. Please see Responses 1.A.-1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #5

Claire M. Ramsey, Staff Attorney on behalf of Legal Aid Society of San Mateo County

10/27/14

Comment

5.A. Comment of Support

We appreciate the opportunity to comment...

Response

5.A. The Department appreciates this comment of support.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #5

Claire M. Ramsey, Staff Attorney on behalf of Legal Aid Society of San Mateo County

10/27/14

Comment

5.B. Support of CANHR Comments

“...we support all the comments made by California Advocates for Nursing Home Reform and urge the Department to adopt its recommendations.”

Response

5.B. The Department acknowledges the support for the comments presented by CANHR. The Department's responses to the comments presented by Patricia McGinnis of CANHR are available in Responses 1.A.-1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #5

Claire M. Ramsey, Staff Attorney on behalf of Legal Aid Society of San Mateo County
10/27/14

Comment

5.C. 50961(d)(1) Estate Claims—Under Age 55

The Department should clarify that the regulation only applies to individuals who are 55 years old and younger who were permanently institutionalized in a long-term care setting. This change will ensure that the regulations are clearly in line with the federal law (42 U.S.C. § 1396p(a)). Therefore, we suggest this section be amended to read:

(1) Where the decedent was under age 55 when the services were provided, unless the decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and who has been determined, after notice and an opportunity for a hearing, to be permanently institutionalized.

Response

5.C. Please see Response 1.D.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #5

Claire M. Ramsey, Staff Attorney on behalf of Legal Aid Society of San Mateo County
10/27/14

Comment

5.D. Section 50961(f) Estate Claims – Surviving Spouse

The Department has overstepped its authority in drafting this proposed regulation. If a surviving spouse is granted a hardship waiver, and the Department approves it, that claim is waived, not deferred for later collection activities. (Welfare & Institutions Code § 14009.5(c)(1)).

Response

5.D. Please see Response 1E.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #5

Claire M. Ramsey, Staff Attorney on behalf of Legal Aid Society of San Mateo County

10/27/14

Comment

5.E. 50963(f) Substantial Hardship Waiver—90-Day Timeframe

The Department should retain the 90-day timeline currently mandated in the regulations. Although the Department asserts this will not impact a decedent's heirs, there is no support for this claim. Delays in estate recovery decisions cause delay and uncertainty in estate proceedings. This causes harm to heirs, state courts, and estate administrators. If the 90-day timeline is no longer a feasible deadline for the Department, a more realistic one should be proposed. This new deadline should consider not only the Department's current backlog, but the causes of that backlog and the requirements of the U.S. Department of Health and Human Services.

Response

5.E. Please see Response 1G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center

10/29/14

Comment

6.A. Comment of Support

We appreciate that DHCS is updating its regulations to reflect changes brought about by the Windsor decision. Timely regulatory changes prevent confusion and help ensure that beneficiary rights are understood and respected.

Response

6.A. The Department appreciates this comment of support.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center
10/29/14

Comment

6.B. Concern about Proposed Language

We have concerns, however, about certain proposed language that does not appear to reflect current law and, in fact, would deny important consumer protections in the estate recovery program.

Response

6.B. This comment is related to 6.C. through 6.G. Please see Responses 6.C.-6.G. below.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center
10/29/14

Comment

6.C. Section 50961(c) Estate Claims

The comment submitted in Comment Letter #6 is identical to the comment submitted in Comment Letter #1. Please see Comment 1.A.

Response

6.C. Please see Response 1.A.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center
10/29/14

Comment

6.D. Section 50961(d) Estate Claims

We recommend that the language, “An exemption from or deferral of” be deleted and that this section should read “The Department shall not make a claim in any of the following circumstances.”

Our recommendation more closely tracks the state statute, Welfare and Institutions Code § 14009.5, which reads: “*The Department may not claim in any of the following circumstances:*” Staying with the language of the statute is clearer and more accurate.

Response

6.D. Please see Response 1.B.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center
10/29/14

Comment

6.E. Section 50961(d)(1) Estate Claims—Under Age 55

We suggest that this section be amended to read:

(1) Where the decedent was under age 55 when the services were provided, unless the decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and the decedent has been determined, after notice and opportunity for a hearing, to be permanently institutionalized.

The state only has authority to recover from those beneficiaries who were under age 55 when benefits were received and when the individual has been determined to be permanently institutionalized. (42 USC 1396p(a).) That limit should be clearly reflected in the regulation.

Response

6.E. Please see Response 1.D.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center
10/29/14

Comment

6.F. Section 50963(a) Substantial Hardship Waiver

We suggest that this language be changed to read:

(a) The Department shall waive the applicant's proportionate share of the claim if the applicant can demonstrate through adequate documentation or submission of an ~~written, completed~~ Application for Hardship Waiver, form DHCS 6195 (8/075-11), ...

The regulation should better reflect what is actually needed to justify an exemption. Submission of a "written, completed" hardship application is not applicable to several of the hardship criteria, including 50963(a) (3), (4) and (5). These criteria require other documentation that is relevant to the hardship in question.

The information requested on the application should be specific and limited to the applicable hardship criteria.

Further, the application itself should be modified. The Hardship application currently reads: "...failure to completely and accurately provide the information may result in denial of the waiver application." This is not compatible with the regulations that require the Department "shall" waive the applicant's proportionate share of the claim if one or more of the following factors apply:"

If, for example, the applicant can demonstrate that he is aged, has lived continuously in the decedent's home for at least one year prior to decedent's death, continues to live in the home, is unable to obtain financing to repay the State, and he submits a denial letter from a financial institution – he meets the criteria of §50963(a)(3) and the State is mandated to waive the claim, regardless of whether the Hardship Application is "completely and accurately" done.

Response

6.F. Please see Response 1.F.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #6

Georgia Burke, Directing Attorney and Amber Cutler, Staff Attorney on behalf of National Senior Citizens Law Center
10/29/14

Comment

6.G. Section 50963 (f) Hardship Waiver 90 Day Timeframe

We have strong objections to elimination of a deadline for determining a hardship exemption and recommend retaining the current language “..within 90 days of the application’s submission.”

Eliminating the 90 day deadline is inconsistent with California’s State Plan, filed with HHS. See California State Plan, Attachment 4-17-A. Further, removing any deadline is inconsistent with the State Medicaid Manual (SMM) Section 3810,p. 3-9-7 , which specifies as follows:

You must adopt procedures under which individuals who will be affected by recovery of amounts of medical assistance will have the right to apply for an undue hardship waiver. These procedures must, at a minimum, provide for advance notice of any proposed recovery. They must also specify the method for applying for a waiver, the hearing and appeal rights, and the time frames involved. (Emphasis added)

The elimination of any timeline for determining hardship requests is contrary to federal law, subverts due process and will, in itself, cause undue hardship.

The Department’s assertion that the deletion of the time limit “causes no harm to applicants” is incorrect. Heirs and survivors of deceased beneficiaries will not be able to settle estates until the hardship determination is made. This could take up to three years, creating havoc in trusts and estate settlement procedures.

Further, eliminating deadlines for any government action is simply bad policy and eliminates accountability for government agencies.

Response

6.G. Please see Response 1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #7

Donald Nollar, Training Specialist on behalf of Maternal and Child Health Access

10/29/14

Comment

7.A. Estate Recovery as a Deterrent

Medi-Cal estate recovery has been a deterrent for many people signing up for Medi-Cal.

Response

7.A. This comment is outside the scope of this regulatory action.

The Department has no evidence that estate recovery has deterred people from signing up for Medi-Cal. Since October 2013, Medi-Cal enrollment has increased by approximately 2.3 million.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #7

Donald Nollar, Training Specialist on behalf of Maternal and Child Health Access

10/29/14

Comment

7.B. Surviving Spouse Recovery

It is critical that our current regulations be clear and specific in exactly what benefits can be recovered and in protecting the interest of surviving spouses who apply for a hardship waiver.

Response

7.B. The Department concurs that the regulations must clearly specify the benefits that can be recovered. The Department does not claim during the lifetime of a surviving spouse; therefore, a surviving spouse would not need to apply for a hardship waiver.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #7

Donald Nollar, Training Specialist on behalf of Maternal and Child Health Access

10/29/14

Comment

7.C. CANHR and Western Center on Law and Poverty Support

We join CANHR and the Western Center on Law and Poverty in recommending the following changes:

Response

7.C. The Department acknowledges the support for the comments presented by CANHR and the Western Center on Law and Poverty. The Department's responses to the comments presented by Patricia McGinnis of CANHR and Western Center on Law and Poverty are provided in Responses 1.A.-1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #7

Donald Nollar, Training Specialist on behalf of Maternal and Child Health Access

10/29/14

Comment

7.D.- 7.J. Comments 7.D. -7.J. are identical to Comments 1.A.-1.G. submitted in Comment Letter #1. Please see Comments 1.A.-1.G.

Response

7.D. – 7.J. Please see Responses 1.A.-1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #8

Blanco Castro, Manager of Advocacy on behalf of AARP California

11/5/14

Comment

8.A. CANHR Support

We concur with the comment letter from Patricia McGinnis of CANHR, dated October 14, 2014.

Response

8.A. The Department acknowledges the support for the comments presented by CANHR. The Department's responses to the comments presented by Patricia McGinnis of CANHR are provided in Responses 1.A.-1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #8

Blanco Castro, Manager of Advocacy on behalf of AARP California

11/5/14

Comment

8.B. Section 50963(a) Hardship Waiver Application

We concur with CANHR's recommendation to insert language that "adequate documentation or" submission of an application should meet the Department's criteria. The proposed regulatory language amendment would improve and expedite the process for those seeking a hardship waiver. This language will help to eliminate the bottlenecks for consumers. Having either adequate documentation or submission of an application would go a long way towards easing the process for consumers.

Response

8.B. Please see Response 1.F.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #8

Blanco Castro, Manager of Advocacy on behalf of AARP California

11/5/14

Comment

8.C. Section 50963(f) Hardship Waiver – 90 Day Timeline

We agree with the CANHR recommendation to retain the current language “...within 90 days of the application’s submission.” AARP strongly believes that a clear timeframe should be specified so that expectations are clear for consumers.

Response

8.C. Please see Response 1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #9

Kimberly Lewis, Managing Attorney on behalf of National Health Law Program (NHeLP)

11/5/14

Comment

9.A. Comment of Support

While we agree with DHCS’ proposed changes to the regulations 1) specifying that estate recovery shall not include payments made to certain dual eligible groups pursuant to MIPPA of 2008, and 2) noting the existing spousal and domestic partner protections related to estate recovery...

Response

9.A. The Department appreciates these comments of support.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #9

Kimberly Lewis, Managing Attorney on behalf of National Health Law Program (NHeLP)

11/5/14

Comment

9.B. Hardship Waiver – 90 Day Timeframe

...we are concerned with the changes made regarding the hardship waiver, particularly the elimination of the current timeframe within which DHCS must render a decision regarding a hardship waiver application because it is contrary to federal law and a timely process is necessary.

Response

9.B. Please see Response 1.G.

Commenter Name, Title, Organization and Date Comment Received

COMMENT LETTER #9

Kimberly Lewis, Managing Attorney on behalf of National Health Law Program (NHeLP)

11/5/14

Comment

9.C.-9.I. Comments 9.C.-9.I. are identical to comments 1.A.-1.G. submitted in Comment Letter #1. Please see Comments 1.A.-1.G.

Response

9.C.-9.I. Please see Responses 1.A.-1.G.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.A.Comment of Support

We applaud the Department, first of all, for including in there finally same-sex spouses and registered domestic partners in providing some relief for them in terms of the Medi-Cal recovery program. I know that's been a long time coming and we certainly welcome that.

Response

10.A. The Department appreciates this comment of support.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.B. Section 50961 Notice of Estate Recovery

One of the problems with the managed care plans and what we're seeing right now with the Medi-Cal expansion is the people have absolutely no idea that if they are 55 and older, and signing up for Medi-Cal recovery—or Medi-Cal expansion, that they are going to be subject to recovery.

Now, I know that they get a yellow notice later on at some point. However, when they sign up, there is nothing to that effect on the application. There's nothing in the notices that the Department puts out. There's nothing on the California covered—Covered California website. And one of the problems is that people are just then reluctant to sign up for Medi-Cal period.

We've noticed in the regulations that there is no provision for a separate notice to the beneficiary that explains that the premium payments made to the managed care organization will be included either in whole or in part in the claim against the beneficiary's estate.

Now, that language is required under the State Medicaid manual transmittal number 75, part 3, which the Department in its Statement of Reasons relies on as one of their legal justifications for these changes. And we strongly recommend that provisions for that notice be included in these regulations.

Response

10.B. Please see Response 1.A.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.C. Estate Claims – Exemption vs. Deferral

Secondly, section 50961(d), an exemption or deferral from should be deleted from that section. If you're going to use language like that, then we need to change 14 -- health -- Welfare and Institutions Code 14009.5, because this language in the regulation is simply inconsistent with the current statute. The current statute says the Department may not claim in any of the following circumstances. The statute doesn't talk about deferral or they don't talk about exemption from, they talk about may not claim. And that's something again I think it -- it's just simply inconsistent and confusing. I'm not talking about a deferral of a claim. And in some cases, you're not talking about any claim at all, particularly if the surviving spouse has nothing from the deceased Medi-Cal spouse.

Response

10.C. Please see Response 1.B.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.D. Section 50961(d)(1) Estate Claims – Under Age 55

Section 50961(d)(1). This has long been a subject of discussion in our organization. The Department, for whatever reason, indicate that it can recover for benefits paid from those under 55 simply because they were residents in a nursing facility. That's what the law says, that's what the regulations say, and in fact this is completely contrary to federal law. I will say very strongly that the current regulations, the current practice of the Department violates federal law and invites litigation.

If the Department indeed wants to recover, particularly for those who are determined to have been permanently institutionalized, then the Department needs to set up the process that they promised in their initial -- what do I want to -- State Plan Amendment to HCFA back in '93, '94, and '95. Oh, yes, we have these processes in place. I've never seen it. I have never once seen a hearing for somebody to determine whether or not that person under 55 years of age is going to be permanently institutionalized. And I think right now, if the Department is in fact alleging that they can recover from somebody who's under the age of 55 simply because that person was institutionalized in a nursing home, even for a limited period of time, that's illegal.

Response

10.D. Please see Response 1.D.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.E. Section 50961(f) Estate Claims – Waiver vs. Deferral

Section 50961 basically repeats what (f), which what we said in the beginning, that the statute provides for waiver not deferral. We recommend that language be changed.

Response

10.E. Please see Response 1.B.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.F. Section 50963(a) Substantial Hardship Criteria

Section 50963(a), the hardship criteria. I noticed in the Statement of Reasons that the Department at least for their reasons for trying to eliminate the 90-daytime line for responding to hardship appeals is that you simply can't keep up with the paperwork. And I understand that, but one of the reasons for that, because I've been through this with hundreds and hundreds of hardship appeals, administrative law appeals, et cetera, is the Department is asking for information from recipients or from applicants that is absolutely irrelevant to their hardship appeal. And I go into more detail in the comments, but the Department shall waive the applicant's proportionate share of the claim if the applicant can demonstrate through a written completed, blah, blah, blah, and then submission of a written completed hardship application frankly is not applicable to several of the hardship criteria. If I can show that I'm age, blind, or disabled, that I've lived in the home for at least a year, that I've continued to live there, that I can't get a loan from a bank to pay the estate recovery claim, that should be enough documentation, and you shouldn't need all of the other information.

I realize that some things are a little bit more on the border line, and you might want to get more information, but I do believe you ought to train the people who are in the recovery unit to request that kind of information, if they need it. But if they've got adequate documentation in the beginning, there is absolutely no reason for the hardship application to say failure to completely and accurately provide the information may result in denial of the waiver application. I don't think so. I think that if I have a client who puts in the documentation necessary to meet the criteria, particularly in 50963(a)(3), (4), or (5), then you need to waive the claim. And, in fact, the regulation says the Department shall waive the claim, if one or more of these criteria are met.

You want to save yourselves some time, you want to save some stress on the folks who are working in the recovery unit, maybe that's one way to streamline the process when you're looking at the hardship process, because, frankly, I look at day after day I'm getting calls from people, I'm getting emails from people, not only do they submit all of this stuff, that is completely irrelevant to their hardship criteria, but then the Department loses it, and then they have to submit it all over again. So this is something that I think needs clean-up work within the Department, if you really want to save some time.

Response

10.F. Please see Responses 1.F. and 1.G.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.G. Section 50963(a) Substantial Hardship Waiver – 90 Day Timeframe

And then lastly, we recommend that the current language, within 90 days of the applicant submission, be retained. I will tell you right now, we'll sue. If this language -- if you go without any timeline whatsoever, I'm not threatening to sue, I'm saying our organization, along with as many other organizations as we can get, we will sue the Department to get -- maintain some kind of a timeline. Now, I realize that the State law, the federal law does not require a timeline, but if you look at the Medicaid State manual, if you look at the House of Representatives report, and the legislative intent of Congress in passing this, they wanted each State to have some timelines.

And then to say in the Statement of Reasons that you don't think it's going to -- causes no harm to applicants. Please. Right now, the delays by the Department are causing enormous harm to applicants, because they can't probate the estate, they can't settle the estate, they can't distribute the estate. And this is just folly to say that this is going to solve the problems of the Estate Recovery Unit by eliminating a timeline. It won't. It's only going to start your problems, I can guarantee that.

Response

10.G. Please see Response 1.G.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.H. Comment of Support

But I will say, again, I applaud the Department for finally recognizing -- well, although the Department has recognized, at least on an informal basis, for a long time same-sex spouses and registered domestic partners, unlike many other states in the country, probably all the other states...

Response

10.H. The Department appreciates the comment of support.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.I. Comment of Concern

...but some of these regulations are going to be extraordinary harmful to applicants.

Response

10.I. This comment is not specific enough for a response. Please see responses to comments throughout this Addendum.

Commenter Name, Title, Organization and Date Comment Received

#10 ORAL TESTIMONY of 11/4/14

Patricia McGinnis, Executive Director on behalf of California Advocates for Nursing Home Reform (CANHR)

Comment

10.J. – General Recovery Comment

Frankly, recovery is bad enough. What we are doing is that we are destabilizing low-income communities in this State. And we're going to spend as much work as we can to stop that. It's the low-income people, people who cannot afford lawyers to do adequate estate planning, they're the ones who are getting screwed under this process, and these regulations don't help, I can tell you that.

Response

10.J. Federal law, Title 42 USC, section 1396p, and W&I Code section 14009.5, require that the State seek recovery from the estates of deceased Medi-Cal beneficiaries.

This comment is not specific enough for a detailed response. Please see responses to comments throughout this Addendum.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Comment

11.A. CANHR Similarities

Many of our comments are very similar to Pat's. We sent a letter on October 24th outlining our comments, but I'm here to give voice to them.

Response

11.A. The Department acknowledges the similarity of these comments to those presented by Patricia McGinnis of CANHR. Please see Comments and Responses 1.A.–1.G.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Comment

11.B. Estate Recovery as a Deterrent

So as Pat mentioned, that there are some concerns we have generally with Medi-Cal estate recovery. In terms of access, we've heard many individuals having difficulty just -- or many individuals choosing not to sign up for Medi-Cal for -- and foregoing health insurance due to Medi-Cal estate recovery and the threat of taking away their family home.

Response

11.B. Please see Response 7.A.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Comment

11.C. Comments of Support

We recognize that there are some good components. That the recognition of same-sex spouse and registered domestic partnerships.

Response

11.C. The Department appreciates this comment of support.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Comment

11.D. Notice to Beneficiary of Recovery of Payment to Managed Care Premiums

However, there are several onerous changes in the proposed regulations that we would like to speak to. Firstly, regarding Section 50961(c), we recommend the following sentence be added to the end of the paragraph, specifically, "The recovery of payments to managed care plans shall be made only for payments made after the Department has provided a separate notice to the beneficiary that explains the premium payments made to the managed care organizations will be included either in whole or in part in the claim against the beneficiary estate". This language is required by CMS in the State Medicaid manual. And so the -- as it's required, it should be included in the proposed regulation.

Response

11.D. Please see Response 1.A.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Comment

11.E. Amount Due to Medi-Cal

In addition, we've heard from some of our own clients the difficulty in obtaining information regarding what is owed. They've filled out the paperwork work to determine what's -- and paid the \$25, and still have had challenges in determining what is that -- the premium payments.

Response

11.E. This specific comment is outside the scope of this regulatory action.

However, beneficiaries can request information detailing Medi-Cal payments made on their behalf. The Department is currently working to streamline the process; however, this money is not owed. The Department's claim is limited to the value of the assets owned by the Medi-Cal beneficiary at the time of death or the value of services provided by Medi-Cal, whichever is less.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Comment

11.F. Exemption and Deferral

Secondly, Section 50961 part (d), we recommend that the language, "An exemption from or deferral of..." be deleted and instead read, "The Department shall not make a claim in any of the following circumstances:". This complies with State statute, Welfare and Institution Code 14009.5.

And so these -- the statute makes no reference to exemptions or deferrals. These are new concepts imposed by the Department and may not be non-substantive as claimed.

Response

11.F. Please see Response 1.B.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Transcript received 11/13/2014

Comment

11.G. Section 50961(d)(1) Estate Claims—Under Age 55

Thirdly, section 50961(d)(1), we suggest that this section be amended to read, "Where the decedent was under age 55 when the services were provided, unless the decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution;", specifically the change be, "...and who has been determined after notice and opportunity for a hearing to be permanently institutionalized".

The Department's regulation indicate that it can recover for benefits paid from those under age 55, because they were inpatient in a nursing facility. However, the State has no authority to recover from these beneficiaries who were under age 55 when benefits were received, unless that individual has been determined to be permanently institutionalized. And that's found in current federal regulation. There is also no other federal authority for regulations from those under age 55. So as it is, the Department's policies and regulations are contrary to federal law and so should be changed, and is ultimately unenforceable.

Response

11.G. Please see Response 1.D.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Transcript received 11/13/2014

Comment

11.H. Section 50961(f) Estate Claims—Waiver vs. Deferral

Fourth, in section 50961(f), there's no authority for this proposed regulation. The statute provides for a waiver not a deferral. And so in support of this is Welfare and Institution Code section 14009.5(c)(1) that states, "The Department shall waive its claim in whole or in part...". So it says waive, not defer.

Response

11.H. Please see Response 1.E.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Transcript received 11/13/2014

Comment

11.I. Section 50963(a) Substantial Hardship Waiver

And finally, in section 50963(a), we recommend that the changes be made that the -- that the Department shall waive the applicant's proportionate share of the claim if the applicant can demonstrate, through documentation, sufficient to prove hardship or submission of an application of hardship waiver.

Considering how, as Pat mentioned, that there are challenges going through the documentation. And from both the beneficiary side, as well as the State side reducing that paperwork and not making it so burdensome is, I think, a goal that will benefit both the Department, as well as the beneficiary.

Response

11.I. Please see Response 1.F.

Commenter Name, Title, Organization and Date Comment Received

#11 ORAL TESTIMONY of 11/4/14

Linda Nguy, Legislative Advocate on behalf of Western Center on Law and Poverty

Transcript received 11/13/2014

Comment

11.J. Substantial Hardship Waiver – 90 Day Timeframe

Lastly, in Section 50963(f), we strongly recommend retaining the current language within 90 days of the application submission. We're concerned that periods longer than that opening it up, 90 days, three months, is already a long time for beneficiaries to receive – to know their -- the results of the decision.

And so federal law requires states to establish procedures for determining when to waive recovery. And the criteria included in the State Medicaid manual specifies that you must adopt procedures under which individuals who will be affected by recovery amounts of medical assistance will have the right to apply for an undue hardship. These procedures must, at a minimum, provide for advanced notice of any proposed recovery. They must also specify the method for applying for a waiver, get the hearing and the appeals rights, and the time frames involved.

Having no time frame involved would go against this. So we strongly encourage the Department to have the 90 days remain in the proposed regulations.

Response

11.J. Please see Response 1.G.