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LEGAL RESOURCES PROGRAM UPDATE
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NYC Medicaid Program Revises M11q Form – Medical Request for Home Care

For the first time in over 20 years, the New York City Medicaid Home Care Services Program has revised the Form M11q, the Medical Request for Home Care. This is the form signed by the treating physician that describes the medical and functional need for Medicaid personal care services (a/k/a home attendant services) in New York City. Each local county's Medicaid program designs its own "physician's order" form, which is a required part of the assessment process for personal care services.¹ The M11q is New York City's version of the form.

- The new M11q can be found at http://onlineresources.wnyc.net/healthcare/docs/M-11Q_fillable.pdf (11/08 version). See explanation below re this electronic version.

1. When is new form effective, and can I still use the old M11q?

According to the NYS Department of Health "Medicaid Update," the new form has been implemented since December 1, 2008. "The Home Care Services Program will continue to accept the current M11q form until May 31, 2009. Providers may obtain a copy of the revised (11/08) M11q form by contacting the Home Care Services Program at (212) 360-5030 or (212) 360-5434. Providers are encouraged to reproduce the form for their use."²

2. How is the new form different than the old form?

- The main change is that the "Physician's Certification" section, which is where the treating physician signs the form, has been moved from the bottom of Page 3 to the top of Page 4, and has been significantly enlarged. This change is discussed at length below. As a result, the space for additional comments on Page 4, which was formerly the entire page, has been significantly reduced. A 5th page for comments will have to be submitted. (See Template for comment page, created by Selfhelp, posted at <http://onlineresources.wnyc.net/healthcare/docs/M-11q%20Continuation.dot>.)

¹ 18 N.Y.C.R.R. § 505.14(b).

² NYS DOH Medicaid Update, December 2008, Vol. 24, Issue 14 p. 9 (posted at http://www.health.state.ny.us/health_care/medicaid/program/update/2008/2008-12.htm)

- The Physician’s Certification on page 4 now has a helpful reminder that the physician’s signature must be within 30 days after the medical exam of the patient, which is a requirement in the state regulation.
- Page 1 has:
 - a new NYC HRA logo,
 - requests that the Client’s Name be stated LAST NAME first, and
 - Section II- Medical Status, page 1: ICD Code must be entered next to the primary and secondary diagnosis.

3. How has the Physician’s Certification changed?

The old certification was written in a small typeface at the bottom of page 3 and provided:

I, the undersigned physician, do certify that all the medical information contained within this form is both true and complete to the best of my knowledge and that I may be contacted for further clarification.

The new certification is written in large bold typeface and takes up nearly a third of page 4:

I, the undersigned physician, certify that this patient can be cared for at home, and that I have accurately described his or her medical condition, needs and regimens, including any medication regimens, at the time I examined him or her. I understand that I am not to recommend the number of hours of personal care services that patient may require. I also understand that this physician’s order is subject to the New York State Department of Health regulations at Part 515, 516, 517, and 518 of Title 18 NYCRR, which permit the Department to impose monetary penalties on, or sanction and recover overpayments from, providers or prescribers of medical care, services or supplies when medical care, services or supplies that are unnecessary, improper or exceed the patient’s documented medical condition are provided or ordered.

4. What are at Parts 515, 516, 517, and 518 of Title 18 NYCRR mentioned in the Certification?

These are rules that have been in effect since at least the early 1990’s that provide sanctions and penalties for physicians who commit fraud, abuse, or who knew or had reason to know that services they prescribed were unnecessary, improper, or exceed the patient’s medical condition.

Part 515 – Provider Sanctions – general section about sanctions against providers for “unacceptable practices,” which include “Furnishing or ordering medical care, services or supplies that are substantially in excess of the client’s needs.” Sec. 515.2 (11).

Part 516 – Monetary Penalties against providers for unacceptable practices

Part 517 – Provider Audits – requires providers who bill Medicaid fee-for-service to retain records for six years

Part 518 - Overpayments -- Providers may be required to repay the State for inappropriate, improper, unnecessary or excessive care furnished directly or that the physician prescribed. “Medical care, services or supplies ordered or prescribed will be considered excessive or not medically necessary unless the medical basis and specific need for them are fully and properly documented in the client's medical record.”

5. If these sanctions have been on the books since the early 1990's, why is HRA now highlighting them?

A high-level HRA administrator explained that a recent federal audit found that some physicians who signed M11q forms had *no record* of ever seeing the individuals described in the M11q's as patients. Signing an M11q for a patient who the doctor never saw would, of course, be a violation of the rules and subject to sanctions. However, the new certification goes further and warns doctors against prescribing services that are “unnecessary, improper or exceed the patient's documented medical condition.” As long as a physician retains records of their treatment of the patient for the requisite six years, these records reflect the patient's medical condition as described in the M11q, and the physician uses his or her reasonable professional judgment in recommending the amount of personal care services as medically necessary, s/he could not be subject to any sanctions.

- o Advocates can tell physicians that the warning must mean to weed out fraud – not good faith assessments of necessary services.

6. What about the part of the Certification that states, “I understand that I am not to recommend the number of hours of personal care services that patient may require.”

Since 1992, state regulations have provided that in the physician's order (M11q in NYC), the “medical professional must not recommend the number of hours of personal care services that the patient should be authorized to receive.” 18 NYCRR 505.14(b)(3)(i)(3). The rule was unsuccessfully challenged in court, so remains on the books.³ However, later developments in the personal care assessment process give authority for the treating physician to recommend, if not the number of hours, the “**span of time**” during which the need for personal care services arises. Also, the regulation requires that the physician “certify that the patient can be cared for at home.” The physician could believe it necessary to qualify that the patient can be cared for at home provided that home care is provided during x times of day.

1. Local districts may not use “a task-based assessment when the applicant or recipient of personal care services has been determined by the social services district or the State to

³ *Kuppersmith v. Perales*, 688 N.Y.S.2d 96 (1999), affirming 668 N.Y.S.2d 381 (App. Div. 1st Dept. 1998).

be in need of 24 hour personal care, including continuous (split-shift or multi-shift) care, 24 hour sleep-in care or the equivalent provided by formal or informal caregivers. The determination of the need for such 24 hour personal care, including continuous (split-shift or multi-shift) care, shall be made without regard to the availability of formal or informal caregivers to assist in the provision of such care.” 18 NYCRR 505.14(b)(5)(v)(d), as amended effective Nov. 1, 2001. ⁴

COMMENT: Since the physician’s order (M11q) is a key part of the assessment process, the district cannot determine the need for 24-hour personal care without the treating physician’s assessment.

2. While this regulation does not expressly state that the treating physician must be consulted as to whether 24-hour care is needed, other parts of the regulations state:
 - o The physician “must complete the physician's order form accurately describing the patient's medical condition and regimens, including any medication regimens, and the patient's need for assistance with personal care services tasks...” 18 NYCRR 505.14(b)(3)(i)(a)(2).

COMMENT: Accurate description of the “patient’s need for assistance” with tasks such as ambulation, transfer and toileting would necessarily include discussion of the frequency of such needs over a 24-hour span.

- o “A physician must sign the physician's order form and certify that the patient can be cared for at home.” 18 NYCRR 505.14(b)(3)(i)(b).

COMMENT: A physician could believe it professionally necessary to qualify this certification by certifying that the patient can be cared for at home provided that 24-hour or x hours of care are provided.

- o In the Statewide settlement in *Rodriguez v. Novello*, Stipulation and Order of Settlement, dated December 19, 2002, the State agreed to modify procedures for task-based assessment. The directive that implements the settlement, called GIS 03 MA/003, dated 1/24/03,⁵ 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**

⁴ This regulation was amended pursuant to the Stipulation in *Mayer v. Wing*, and is known as the “Mayer-Three” exception to Task-Based Assessment. See GIS Message 01 MA/044. *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)(Agreement to amend this regulation is in 11/1/97 Stipulation)

⁵ http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/03ma003.pdf

needs.” It also provides that personal care services include “...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.”

COMMENT: Since the treating physician must, in the M11q, describe the “patient’s need for assistance with personal care services tasks,” (see 2.a. above), discussion of whether these needs occur “at unpredictable times during the day or night” is a necessary part of the physician’s description. Likewise, the physician should discuss whether and during what span of time the patient needs monitoring (also called “cueing,” “prompting,” or “contact guarding”) to assure safe completion of tasks of transferring, toileting, or walking.

- o Part of the settlement in *Rodriguez* applies only to New York City, since it involved claims against the NYC Medicaid program. The City agreed to modify the City’s nurse’s assessment form⁶ so that if the nurse identifies a need for assistance with any of the three key activities of ambulating, transferring or toileting, **the nurse must “indicate the span of time** over which the assistance of a home attendant is required” or explain why assistance is not needed over a span of time.

COMMENT: Since state regulations require that the nurse’s assessment must include “a review and interpretation of the physician’s order,” 18 NYCRR 505.14(b)(3)(iii)(b)(1), the physician’s opinion of the “span of time” during which needs with ambulating, transferring or toileting, would have to be considered.

COMMENT – An informal poll of advocates, including Selfhelp staff, have never heard of an M11q being rejected because the physician stated the number of hours that are needed, despite the 1992 regulation. We believe that if it was rejected, the case developments described above that require consideration of the “span of time” in which needs arise supersedes the regulation and justifies the physician’s recommendation.

7. **Can the form be completed electronically?**

To our knowledge, HRA has not made the form available electronically. Selfhelp created an electronic version of the M11q which can be filled in electronically and can be downloaded at http://onlineresources.wnyc.net/healthcare/docs/M-11Q_fillable.pdf. This formatting (which is thanks to David Silva, Ass’t. Director of Selfhelp’s Evelyn Frank Legal Resources Program), is not a feature of the official form. Though you can download the blank form and make copies, you cannot save changes typed into the form unless you have an advanced version of Adobe Acrobat (not just the free Reader) or similar PDF program.

⁶ Nurse’s assessment is required under 18 NYCRR 505.14(b)(3)(iii).

COMMENT PAGE: Since the Comment section on page 4 is now so short, you will probably want to attach extra comments. David Silva of Selfhelp has created a template for this extra page, posted at <http://onlineresources.wnylc.net/healthcare/docs/M-11q%20Continuation.dot>