



STATE OF NEW YORK

DEPARTMENT OF HEALTH

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ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 02 OMM/ADM-4

TO: Commissioners of
Social Services

DIVISION: Office of Medicaid
Management

DATE: May 28, 2002

SUBJECT: Notice and Fair Hearing Procedures for the Long Term Home Health
Care Program

**SUGGESTED
DISTRIBUTION:**

Directors of Social Services
Home Care Staff
Medicaid Staff
Long Term Home Health Care Programs
Fair Hearing Staff
Legal Staff

**CONTACT
PERSON:**

Any questions concerning this release should be directed
to Dorah Bluth, Bureau of Long Term Care, by calling
(518) 474-5271

ATTACHMENTS:

Long Term Home Health Care Program Fair Hearing Notices
Physician Confirmation Form
See Appendix I for a listing of attachments

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
83 ADM-74	GIS 01-MA-035	18 NYCRR 505.21	SSL 367-C		

I. PURPOSE

The purpose of this Directive is to advise Local Departments of Social Services (LDSS) and Long Term Home Health Care Programs (LTHHCP) of new fair hearing procedures. These procedures relate to LTHHCP participants' existing as well as new fair hearing rights. With respect to LTHHCP participants' existing fair hearing rights, this Directive includes fair hearing notices that districts must send under the following circumstances described in 83 ADM-74: when the Medicaid recipient's application for participation in the LTHHCP is denied; when the recipient's participation in the LTHHCP is discontinued; and, when there is a change in the recipient's level of care budget cap from Skilled Nursing Facility (SNF) to Health Related Facility (HRF). With respect to LTHHCP participants' new fair hearing rights, this Directive describes the additional fair hearing rights now required when a LDSS or a LTHHCP proposes to deny, discontinue or reduce one or more services in the recipient's plan of care, **contrary to treating physician's orders**, but does not propose to terminate the recipient's participation in the LTHHCP.

II. BACKGROUND

Under 83-ADM-74, LTHHCP applicants/recipients were entitled to notice and fair hearing rights under the three circumstances described above. The Department's previous ADMS required districts to develop their own notices. To assure uniformity, the Department has now developed standard notices that districts must send when they or the LTHHCP propose to deny a Medicaid recipient's application to participate in the LTHHCP, to discontinue the recipient's participation in the LTHHCP or to reduce the level of care budget from SNF to HRF.

In addition, this Directive implements new fair hearing rights consistent with stipulations in the Simmons v. DeBuono (Supreme Court, Erie County, 2000) and Bernard v. Novello (E.D.N.Y., 2001) cases. Under these new procedures, LTHHCP recipients are entitled to notice and fair hearing rights when a LDSS or a LTHHCP proposes to deny, reduce or discontinue one or more services in the LTHHCP participant's plan of care contrary to his or her treating physician's orders, but does not propose to terminate the recipient's participation in the LTHHCP. In GIS 01-MA-035, the Department previously provided fair hearing notices for the specific services involved in the Simmons and Bernard litigation (personal care, home health aide, and physical therapy). A recipient may also request a fair hearing when other services in the LTHHCP plan of care are denied, discontinued or reduced contrary to the treating physician's orders (e.g., occupational therapy). To simplify the notices, the Department has developed a general notice which must be used whenever a service in the recipient's LTHHCP plan of care is denied, discontinued or reduced contrary to the recipient's treating physician's orders. Districts should use these notices and discontinue use of the notices set forth in GIS 01-MA-035.

III. PROGRAM IMPLICATIONS

Previous fair hearing requirements outlined in 83 ADM-74 required LTHHCP applicants/recipients to be provided timely notice and fair

hearing rights when the LDSS or the LTHHCP:

- denies the application for participation in the LTHHCP;
- discontinue the recipient's participation in the LTHHCP; or
- changes the budgeting level of care for a current LTHHCP participant from SNF to HRF.

These rights will not be affected by the addition of the rights outlined in this Directive.

The additional rights are:

- LTHHCP recipients are entitled to fair hearing rights when the number of hours of Medicaid funded services previously authorized under their care plans is reduced or discontinued **contrary to their treating physicians' orders.**
- LTHHCP recipients are entitled to fair hearing rights when Medicaid funded services are denied **contrary to their treating physicians' orders.**
- LTHHCP recipients are entitled to fair hearing rights under 18 NYCRR section 358-3.1(b)(6) to review the adequacy of their Medicaid funded services.

IV. REQUIRED ACTION

A. NOTIFICATION REQUIREMENTS FOR LTHHCP & LDSS

1) Notices for Existing Fair Hearing Rights

Prior to issuance of this Directive, the Department had not provided fair hearing notices to be used when the LDSS or the LTHHCP denied an application for participation in the LTHHCP, discontinued a recipient's participation in the LTHHCP or when the budgeting level of care changed from SNF to HRF. To assure statewide uniformity, all fair hearing notices for LTHHCP applicants/recipients have been prepared and are appended to this Directive as attachments.

All the notices included as attachments to this Directive have two versions. Attachments followed by an **A** contain the fair hearing phone numbers for all districts other than New York City. Attachments followed by a **B** contain fair hearing phone numbers for New York City only. Each LDSS must use the appropriate notice for that particular district.

Attachment I, "Notice of Intent to Authorize/Reauthorize or Deny Your Participation in the Long Term Home Health Care Program", is to be used to notify an LTHHCP applicant/recipient that a decision has been made to authorize, reauthorize or deny his or her application to participate in the LTHHCP.

Attachment II, "Notice of Intent to Discontinue Your Participation in the Long Term Home Health Care Program (LTHHCP)", is to be used when participation in the LTHHCP is discontinued.

Attachment III, "Notice of Intent to Reduce Your SNF Level Budget To An HRF Budget In The Long Term Home Health Care Program," is to be used when the budgeting level used to determine the budget cap for a recipient changes from Skilled Nursing Facility (SNF) to Health Related Facility (HRF).

2) New Procedures and Fair Hearing Notice for Reductions or Discontinuances of Services within the LTHHCP

When the LDSS (or LTHHCP) intends to reduce or discontinue one or more services being provided to a LTHHCP recipient, but does not propose to discontinue the recipient's participation in the LTHHCP itself, the following action must be taken before the LTHHCP may implement the proposed reduction or discontinuance of the service:

- a) The LDSS must consult with the recipient's physician, as set forth in (b), below, to determine whether the physician agrees with the proposed reduction or discontinuance of the service. Alternatively, the LDSS may request that the LTHHCP consult with the recipient's physician, as set forth in (b), below. Regardless of whether the LDSS or the LTHHCP assumes responsibility for consulting with the physician, the LDSS and the LTHHCP must communicate closely with each other regarding the recipient's case and the proposed reduction or discontinuance. Close communication and coordination is vital to assure that both the LDSS and the LTHHCP are cognizant of whether the physician agrees, or disagrees, with the proposed reduction or discontinuance since the physician's decision governs whether the LDSS must send the recipient the timely and adequate notice of the proposed action with the right to request a fair hearing with aid-continuing that is appended to this directive as Attachment V, described in (2)(d), below.
- b) The LDSS must obtain a written statement from the recipient's physician that indicates whether the physician agrees or disagrees with the proposed change in the recipient's care plan. The Department has developed the Physician Confirmation Form for this purpose. The Physician Confirmation Form is appended to this directive as **Attachment IV**. The LDSS must use this form, which is to be printed on legal-size paper, or request the Department's approval to use a different form. The LDSS may, alternatively, request that the LTHHCP obtain the written statement from the recipient's physician. When the LTHHCP agrees to obtain this written statement, the LDSS must advise the LTHHCP that the LTHHCP must also use the Physician Confirmation Form or request the Department's approval to use a different form. The LDSS (or the LTHHCP) must send the Physician Confirmation Form (or a Department approved equivalent) to the recipient's physician

and request that the physician complete and return the form within 10 business days. The Physician Confirmation Form contains a space for the LDSS (or the LTHHCP) to indicate the person to whom the physician should return the form, together with such person's telephone and fax numbers. It is preferable that the physician be requested to return the Physician Confirmation Form directly to the LDSS; however, should the form be returned to the LTHHCP, the LTHHCP must notify the LDSS immediately of the physician's determination whether he or she agrees or disagrees with the proposed reduction or discontinuance. The physician's decision governs whether the LDSS must send the recipient the fair hearing notice appended to this directive as Attachment V.

- c) When the physician agrees with the proposed reduction or discontinuance of the recipient's service, the LDSS must notify the LTHHCP that the LTHHCP may implement the proposed reduction or discontinuance. The LDSS is not required to send the recipient a timely and adequate notice with fair hearing and aid-continuing rights. However, the LTHHCP should advise the recipient, in accordance with existing procedures and requirements established pursuant to 10 NYCRR Part 763, of the change in the recipient's service.
- d) When the physician disagrees with the proposed reduction or discontinuance, or fails to return the Physician Confirmation Form, the LDSS must send the recipient the fair hearing notice that is appended to this directive as Attachment V, and which is entitled "Notice of Intent to Reduce or Discontinue Services in the Long Term Home Health Care Program (LTHHCP) Contrary To Physician's Orders." The LDSS must use this notice when it proposes to reduce or discontinue services in the LTHHCP contrary to the recipient's treating physician's order but the recipient's participation in the LTHHCP will not be terminated. The LDSS must also send the LTHHCP a copy of the fair hearing notice. The LDSS must also advise the LTHHCP that it may not reduce or discontinue the service before the effective date of the notice and, if the recipient requests a fair hearing with aid-continuing prior to the effective date of the notice, the LDSS must also advise the LTHHCP that it may not reduce or discontinue the service pending issuance of the fair hearing decision.

Attachment V, "Notice of Intent to Reduce or Discontinue Services in the Long Term Home Health Care Program (LTHHCP) Contrary To Physician's Orders," is to be used when services will be discontinued or reduced in the LTHHCP contrary to the treating physician's orders, but the recipient's participation in the LTHHCP will not be terminated.

- e) The LDSS must notify the LTHHCP immediately if aid continuing is granted for discontinued or reduced services, and instruct the LTHHCP to continue services unchanged pending the fair hearing determination.

3) Notices for Denials

When the LDSS or LTHHCP intends to deny a service contrary to physician's orders, the LDSS is required to send the appropriate notice, below, with fair hearing rights to the recipient. The LDSS must send a copy of the notice to the LTHHCP so it has a copy for its records.

Attachment VI, "Notice of Intent To Deny Services In The Long Term Home Health Care Program Contrary To Physician's Orders," is to be used when services will be denied in the LTHHCP contrary to the treating physician's orders, but the recipient's participation in the LTHHCP will not be terminated

B. REQUIREMENTS FOR FAIR HEARING NOTICES

When completing fair hearing notices, LDSS must include a brief description of the action the district intends to take and the specific reason for such action.

The notices provided with this Directive are mandated and must be reproduced by the LDSS until such time as the notices are printed and become available from the Department. The notices must be on legal size paper and must be reproduced as two sided notices rather than two-paged notices. Any modification to these notices must be submitted in accordance with procedures described in 97 ADM-13, "Procedure for Requesting Approval of Local Equivalent Forms".

IMPORTANT: The notices provided as part of this Directive are in two versions: attachments followed by an **A** have the fair hearing phone numbers used by districts other than New York City; attachments followed by a **B** have the fair hearing phone numbers for New York City. The LDSS must use the appropriate notice for that particular district.

V. SYSTEMS IMPLICATIONS

None

VI. EFFECTIVE DATE

Immediately

Kathryn Kuhmerker
Deputy Commissioner
Office of Medicaid Management