

**SENIOR BULLETIN: MEDICAID – INSTITUTIONAL/COPEs**

**ADSA institutes 96-hour limit for certain caregivers  
without complying with APA requirements**

Without following rulemaking procedures established under the State Administrative Procedures Act, the DSHS Aging & Disability Services Administration (ADSA) has implemented a decision to limit the hours for which one class of caregivers may be compensated. The limit applies to compensation paid under the COPEs, Medicaid Personal Care and Chore programs. The caregivers to whom the limit applies are parents of disabled children, including adult children, who live with them. The limit is 96 hours a month.

The 96-hour limit does not apply to other (non-parent) caregivers who care for people who live with them. It does not apply to caregivers who are caring for their disabled parents, for example. In addition, the new policy does not limit the number of hours of care an affected disabled individual may receive; if the individual is assessed as needing 150 hours, he or she may still get 150 hours of paid care. Only the choice of provider is limited: for any hours of paid care in excess of 96, a client must choose a provider other than the parent who provides the first 96 hours of care.

The new 96-hour policy appears to conflict with RCW 74.39A.270(4), a provision that codifies Initiative 775, Section 6(4). Under the statute, home care clients have “the right to select . . . any individual provider providing services to them.” Also, WAC 388-71-0500 says that a client “may choose an individual provider or home care agency provider.”<sup>1</sup> There are limits to this right: the Department may establish reasonable standards that must be met by providers who are paid under the COPEs or MPC programs, for example. But there does not appear to be any legal authority for distinguishing among providers who have met the Department’s qualifications, and for further limiting client choice by use of a 96-hour policy applied to parents only.

A spokesperson for ADSA has explained that the 96-hour policy “is intended to help ADSA stay within its budget and control utilization of services.” He cited a Federal regulation that allows a state to limit certain services with “utilization control procedures.”<sup>2</sup> There is nothing in the Federal regulation, however, that permits the Department to not follow state statutory choice-of-provider requirements, such as the requirement established under RCW 74.39A.270(4).

In any case, even if it were permissible to implement a properly adopted 96-hour policy, there is no apparent rationale for implementing it without

complying with the requirements of the Administrative Procedures Act (Chapter 34.05 RCW). State law requires that agency rules be adopted in accordance with the procedures, including public notice and opportunity for comment, set forth in RCW 34.05.320. As the Washington Supreme Court has explained, administrative “[r]ules are invalid unless adopted in compliance with the APA.”<sup>3</sup> And a rule, for this purpose, is “an agency action or inaction [that] fall[s] into the APA definition of a rule.”<sup>4</sup> “Rule” is defined in RCW 34.05.010(16) as “any agency order, directive, or regulation of general applicability . . . (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. A policy that applies generally to disabled adults who live with their parents and that restricts their choice of provider for hours of care beyond 96 appears to meet the definition of “rule.”

In August, the Department published notice in the Washington State Register signaling an intent, at some time in the future, to propose a rule “to establish and clarify . . . [t]he maximum number of hours an individual provider or personal aide can be paid when this individual provider or personal aide is a parent, step-parent or adoptive parent and lives in the same household as the client.” WSR 03-17-065. But it had already implemented, and it continues to implement, the 96-hour policy, and no rule has been proposed or adopted. On September 12<sup>th</sup>, ADSA issued a Management Bulletin announcing immediate implementation of the 96-hour policy. (The Management Bulletin is attached to this bulletin.) When rulemaking is required, the issuance of a bulletin does not satisfy the requirements of the Administrative Procedures Act.

In the absence of APA rulemaking, a client aggrieved by a decision applying the 96-hour policy to limit his or her choice of provider for hours beyond 96 hours a month may wish to challenge the decision in an administrative hearing. Since the policy is not supported by any Department rule, an administrative law judge should have authority to reverse a Department decision under the 96-hour policy on the basis of the client choice provisions WAC 388-71-0500 and RCW 74.39A.270(4).

#### Endnotes:

<sup>1</sup> Federal law also contemplates client choice among qualified providers. 42 U.S.C. § 1395a(a).

<sup>2</sup> 42 C.F.R. § 440.230(6). The regulation concerns federal requirement related to the amount, duration and scope of services provided under a Medicaid state plan, does allow states to impose “utilization control procedures” that are “appropriate.” But it does not prevent a state from adopting choice-of-provider provisions, such as those adopted by the electorate in I-775, or give a state a license to violate such provisions once adopted.

<sup>3</sup> *Hillis v. State Dept. of Ecology*, 131 Wn.2d 373, 398, 932 P.2d 139 (1997).

<sup>4</sup> *Ibid.*



STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
AGING AND DISABILITY SERVICES ADMINISTRATION  
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**HCS MANAGEMENT BULLETIN**

**03-63**

September 12, 2003

TO: Area Agency on Aging (AAA) Directors  
Home and Community Services (HCS) Regional Administrators  
Division of Developmental Disabilities (DDD) Regional Administrators

SUBJECT: **AUTHORIZATION TO PARENT PROVIDERS WHO LIVE WITH  
ADULT CLIENTS RECEIVING IN-HOME SERVICES AND TOTAL  
HOURS AN INDIVIDUAL PROVIDER CAN WORK FOR A CLIENT**

In order to promote consistency across programs and adult client populations served through ADSA, we are initiating the following policies effective immediately for clients that are in the application process, or at the time of an ongoing client's next assessment:

- Parent providers, who live in the same household with their adult child who receives COPES, Medicaid Personal Care, or Chore services, may be paid for up to ninety-six (96) hours of care per month, depending on the client's assessed unmet needs. You may authorize additional hours above 96 that the adult child is eligible to receive to another Individual Provider(s) (IP) or a home care agency, depending on the client's assessed unmet needs.
  - Parent is defined as a birth parent, stepparent, or adoptive parent.
  - You may not authorize 96 hours for one parent and 96 hours for the second parent.
  - The only exception to this is a parent providing care under APS with state-only funded service under SSPS Code 4404.
- An IP may work a total of 184 hours per month per client, unless they are a parent provider living in the same household as the adult client. If an IP is working for more than one client, consider the service needs each client has and when they need the services. You can then determine, per WAC 388-71-0515 and WAC 388-71-0546, that the IP can adequately

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perform the services for each client, per RCW 74.39A.095.

- HCS/AAA: You may determine whether the IP is working for more than one Home and Community Services (HCS)/Area Agency on Aging (AAA) client by accessing SSPS and clicking on P23 or P25.
- DDD: You may determine whether the IP is working for more than one DDD client by accessing CASIS “Authorization by provider.”
- If you have reason to believe that the IP is working for both HCS/AAA and DDD, contact the local office. We are working on creating a report that will identify clients dually served by AAA/HCS and DDD.

Address questions to:

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