

**ELDER LAW**

**The Medicaid §1115 Waiver Comes to New York**

BY DANIEL G. FISH



Section 1114 waivers<sup>1</sup> are the latest trend in attempts by various states to circumvent statutory federal Medicaid eligibility requirements. Waiver requests have been submitted by Connecticut, Massachusetts and Minnesota.<sup>2</sup> Now, New York may join the list.

Recent headlines have blamed the elderly for the growth in the Medicaid program and the poor fiscal condition of state and county budgets in New York. In response, the Governor's budget<sup>3</sup> would make Medicaid eligibility rules in New York more restrictive than permitted under federal law. It would do so through an administrative device called a §1115 waiver. It is as though the federal law were being amended through the administrative process. Elder law practitioners need to pay particular attention to the specific proposals and the abusive manner in which those changes would be made. The proposals would affect almost every aspect of Medicaid planning.<sup>4</sup>

In New York, mandatory, fundamental and long-standing federal law for calculating Medicaid eligibility would be repealed and replaced with harsher rules. The look-back period would be extended to 60 months; the penalty-period would start to run upon application rather than the date of the gift and spousal refusal would virtually be eliminated. Another significant proposal would make the community Medicaid program subject to a transfer penalty, but this proposal does not require a §1115 waiver.

**Extend the Look-Back Period**

Medicaid applicants are required to produce financial records so that the agency may determine whether disqualifying transfers were made. The current look-back period is 36 months for nursing home and home-care applications. There is only one exception—for certain trust-related transfers, the look-back period is 60 months. Under Governor George E. Pataki's proposal, Medicaid would go back an additional two years, looking for such transfers. The 60-month rule would apply to applications for both nursing home and home care.

**Penalty-Period**

Currently, if an applicant for nursing home Medicaid has made a transfer of assets within the look-back period, a penalty-period will be imposed. The length of the penalty-period is computed by dividing the amount transferred by the average cost of one month in a nursing home in the particular region of New York.<sup>5</sup>

The disqualification period starts to run the month after the transfer is made. If the Governor's proposal were enacted, the disqualification period would not start to run until the individual filed a Medicaid application.

For example, under current law, if a resident of New York City transferred \$17,390 in January 2004, the disqualification period is two months, as the regional rate is \$8,695 per month. The applicant is disqualified for February and March of 2004, whether or not the individual was in a nursing home during that period. Under the proposal, the disqualification period would not begin to run until the applicant entered the nursing home or applied for community Medicaid benefits. A New York City resident who transferred \$17,390 in January 2004 and entered a nursing home in June of 2004 would be ineligible for June and July 2004.

Spousal refusal was enacted by Congress as part of the Medicare Catastrophic Coverage Act of 1988 (MCCA). Prior to that time, if one spouse needed nursing home placement, both spouses needed to be poor before Medicaid would provide assistance. The stated purpose of spousal refusal was the prevention of pauperization of the elderly. The law permits the healthy spouse to retain his or her resources without jeopardizing the Medicaid eligibility of the ill spouse. The Governor has proposed the elimination of spousal refusal except in limited circumstances.

Under current law, there is no penalty-period for Medicaid applicants seeking community-based services (such as home health care or assisted living) who have transferred assets. Transfers of homesteads to caretaker children and siblings with an equity interest likewise incur no penalty-period. The proposed budget bill would impose a penalty-period for community Medicaid applications with no exception for the transfer of a homestead to a caretaker child or a sibling with an equity interest. Under current law, spousal refusal is available in the home care context. Under the Governor's bill, spousal refusal would not be available if the couple were living together. Unless they were physically separated, spousal refusal would be unavailable.

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## The Structure of Medicaid

The federal Medicaid structure is not mandatory, the individual states are given the choice of participating or not. No state is required to participate in the Medicaid program. If a state chooses to participate, the federal government will reimburse a portion of the cost. The state, or as in New York, the state and the county, must match the federal payments. The federal Medicaid statute establishes uniform eligibility rules. To receive federal funds, the state is required to demonstrate that it is in conformity with the federal eligibility rules regarding the look-back period, the start date of the penalty-period and spousal refusal.

Section 1115 of the Social Security Act, 42 U.S.C. §1315(a),<sup>6</sup> authorizes the Secretary of the U.S. Department of Health and Human Services to waive certain statutory requirements for experimental projects likely to assist in promoting the objectives of the Medicaid program. That discretion is far from unfettered. The discretion to grant the waiver is severely restricted in two ways.

First, in regard to the Medicaid program, only provisions found in §1902 of the Social Security Act (42 U.S.C. §1396a) may be waived. The look-back period and penalty-period provisions the governor is seeking to waive are not found in §1902 of the act. The look-back period and the penalty-period provisions are found in §1917 © of the act (42 U.S.C. §1396p (c)). The Governor is seeking to waive provisions beyond the scope of §1115.

The spousal refusal provisions the Governor is seeking to waive are not found within 42 U.S.C. §1396a either. They are contained in 42 U.S.C. §1396r-5. In fact, an explicit prohibition of any §1115 waiver of spousal refusal is found in 42 U.S.C. §1396r-5(a)(4)(A) which states:

“In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1115 (42 U.S.C. §1315), the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this title.”

The Governor is seeking to waive provisions explicitly beyond the scope of §1115.

The legal basis for New York to seek such a waiver is called into question. The Governor’s budget proposal rests entirely on the assumptions that New York State can request a waiver to impose more restrictive Medicaid eligibility rules and that such a waiver will be granted. The assumptions are flawed.

Second, a waiver must meet the three prong test of *Beno v. Shalala*<sup>7</sup> by showing (1) that there is an experimental, demonstration or pilot program (2) that it is likely to promote the objectives of the Medicaid program and (3) that the extent and time period necessary for the experiment are delineated. The Ninth Circuit held that the purpose behind the waiver must be a genuine research project and cannot be to save money or evade federal requirements.

The proposed New York waiver does not purport to be a research or demonstration project. It is merely a response to financial considerations and is clearly intended to avoid the federal eligibility requirements. It is self-evident that restricting eligibility will reduce expenditures and no research project is needed to prove the point. The gravity of a §1115 waiver is noted by the court in the following language:

“In granting a §1315(a) waiver, the Secretary allows the state to deviate from the minimum requirements which Congress has determined are necessary prerequisites to federal funding. While, ordinarily the Secretary might reasonably argue that she ought to give state officials considerable direction as to how to run a program, these federalism arguments have less weight in the context of a waiver of a congressional requirement. We are not examining the Secretary’s authority to interfere with state officials’ discretion, but rather her authority to waive compliance with federal statutes. While §1315 obviously represents a congressional judgment that, in certain circumstances, such an override is appropriate, we doubt that Congress would enact such comprehensive regulations, frame them in mandatory language, require the Secretary to enforce them, and then enact a statute allowing states to evade these requirements with little or no federal agency review.”

Not since the days of “Granny Goes to Jail”<sup>8</sup> has there been such a threat to the elderly and the elder law bar. The changes proposed by the governor should only be made by the U.S. Congress. The legal authority for the §1115 waivers is questionable and it is also poor policy. The current fiscal position of the state is not a justification for revoking federally based rights.

1. 42 U.S.C. §1315(a)
2. See [www.cma.hhs.gov/medicaid/waivers](http://www.cma.hhs.gov/medicaid/waivers). None of these waiver requests has been granted, they are all pending.
3. S.6058 and A.9558
4. See report by the Elder Law section of the New York State Bar Association, [www.nysba.org/elderlawreport](http://www.nysba.org/elderlawreport)
5. Regional rates range from \$5,842 in the Central Region to \$9,296 on Long Island
6. See Fish, Daniel G. “Connecticut 1115 Medicaid Waiver Proposal”, *New York Law Journal*, March 12, 2003
7. *Beno v. Shalala*, 30F.3d 1057 (9th Cir. 1994)
8. Section 217 of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320a-7b(a)