

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

**Family member caregivers under COPES  
or MPC and “unmet need” for care**

An October 2003 order of the King County Superior Court addressed a lingering question about when a relative can be paid to provide care under the Medicaid Personal Care (MPC) program. It held that if a family member (other than a spouse or a parent of a minor child) who has provided free care in the past now wants to be paid, then he or she may not be considered available to meet an MPC applicant’s needs without payment. The court adopted an interpretation of applicable Department of Social & Health Services regulations that was issued by the Director of the DSHS Home & Community Services Division in a March 2002 Management Bulletin. The Bulletin applies both to the MPC and to the COPES programs.<sup>1</sup>

Eligibility for MPC or COPES services depends on an assessment of needs that are not met by available resources. The Management Bulletin, which the court followed, was issued to clarify whether the needs of an otherwise eligible COPES or Medicaid Personal Care applicant should be considered “met” or “unmet” if a family member with no legal obligation to do so has been providing free care, but now wants to be paid. Is the family member an “available alternative resource” (that is, a resource available as an alternative to paid services), and is the applicant’s need, therefore, met?

The Management Bulletin made clear that the answer to both questions is “no.” The family member who wants to be paid is not an available alternative resource, and an applicant’s need may not be deemed met because a family member has met it for free in the past, or would continue to meet it without compensation in the future, if the family member now wants to be paid.<sup>2</sup> The Superior Court order confirmed these answers.

The bulletin, entitled “Clarifying Informal Supports and Unmet Need,” explains as follows:

“If the client’s needs are currently being met without compensation, *and* the person meeting these needs is willing to continue to do so

without compensation, there is no unmet need. If the person who has been meeting the client's needs indicates they now want to be compensated for providing services, and there are no other resources available to this client, you would then consider the client's need unmet."

The King County case involved a disabled adult seeking payment for care provided by her mother. Court action was necessary because despite the issuance of the Management Bulletin there have been instances of family members being considered available because they had performed free services in the past and would not abandon their vulnerable relatives if compensation were denied. In December of 2002, the chair of the Washington State Bar Association's Elder Law Section wrote to the Director of HCS, observing that "although the management bulletin has made some positive difference, there are still HCS staff members who appear to reject it and there still appear to be virtually identical cases in which one applicant is approved and another denied, based on differing views of the law held by different HCS staff members." After considering the issue, HCS Director Penny Black, in a June 2003 letter, expressed "confiden[ce] that we have eliminated any confusion among staff regarding our policy on unmet need as outlined in [the March 2002 Management Bulletin]."

While there were reasons to hope that progress had been made toward a consistent application of HCS policy in this area, not all problems had been resolved by June of 2003. Conspicuously, the King County case was still pending at that time, and in it the Attorney General, on behalf of the Department, was asserting a position directly contrary to the one taken in the Management Bulletin.

The disabled petitioner in the King County case had been found by an administrative law judge to "need [ ] significant assistance with her activities of daily living." The ALJ found that the disabled woman's mother was "currently meeting those needs" and that she "would like to be paid for the personal care services she provides, but she will continue to meet [her daughter's] needs even if DSHS does not pay her . . . ." In spite of the March 2002 Management Bulletin, the ALJ (in September 2002) and a Review Judge (in February 2003) held that, under these circumstances, there was no unmet need and the disabled woman was not eligible for Medicaid Personal Care services.

That decision was appealed to the Superior Court. In September 2003, the Attorney General filed a brief for the Department in that court arguing that there was no unmet need because the petitioner's mother would care for the petitioner without compensation, and that "the

management bulletin cannot be considered as it is not a law, but merely a policy statement that carries no legal weight . . . .”<sup>3</sup>

Finally, in October 2003, the Attorney General, on behalf of the Department, agreed to an order reversing the Department’s decision and holding that the petitioner was eligible for MPC services. The order, signed by King County Superior Court Judge John P. Erlick on October 8<sup>th</sup>, recited as follows:

Under the Department’s regulations, including WAC 388-71-0440 and –0460, as authoritatively interpreted in a management bulletin issued by the Director of the Department’s Home and Community Services Division dated March 12, 2002, [petitioner’s] mother may not, after having indicated that she wishes to be paid for her services, be considered an available resource as an alternative to Medicaid Personal Care services, and in the absence of other available resources, [petitioner’s] needs should have been considered unmet.<sup>4</sup>

(While the case in which this order was entered involved an application for Medicaid Personal Care services, the issue would be the same, and the result should be the same, if COPES services were in dispute.)

When the Superior Court order was entered, the disabled petitioner had been denied paid services, to which she had been entitled, for more than a year. In addition, the dispute, which should have been resolved by applying published Department policy, had consumed well over a hundred hours of time spent by Department staff, staff of the Office of Administrative Hearings, the Attorney General’s Office and by counsel for the petitioner. It is to be hoped that the court’s order will result in more consistent application of the rules as interpreted in the March 2002 Management Bulletin.

#### Endnotes:

<sup>1</sup> MB-AASA-HCS/AAA/RCS/DDD-02-08. The full text of the Management Bulletin is available on line at the following address:  
<http://www.aasa.dshs.wa.gov/Professional/MB/Default.htm>

<sup>2</sup> The bulletin clarified applicable Department regulations. When people apply for COPES or MPC services, an assessment is made of their unmet needs. These are needs that might be met by COPES or MPC services. In performing the assessment, the assessor is required under what is now WAC 388-71-0203(2)(e) to “take into account . . .

(iv) [a]vailability of alternative resources providing needed assistance, including family, neighbors, friends, community programs, and volunteers.” “Availability” is not explicitly defined in this context.

If a family member genuinely volunteers to provide services for free (that is, he or she does not want to be paid), that person may be considered available as an alternative to COPES or MPC services. In fact, there are many family members providing free care who do not want, and will not accept, compensation from the State. But if a family member has no legal obligation to provide care (an obligation that applies only to spouses and to parents of minor children) and does not want to provide free care, there is no legal basis for considering the person available as an alternative to COPES or MPC.

WAC 388-71-0540(7) authorizes denial of payment for services to a provider who “[i]s already meeting the client’s needs on an informal basis, *and the client’s assessment or reassessment does not identify any unmet need . . .*” (Emphasis added.) Under this section, if free services are already being provided, *an inquiry is still required* to determine whether there is unmet need. In that inquiry, an “assessment or reassessment” must still, as required by WAC 388-15-203(2)(e), take the availability of alternative resources into account. And availability of the family member (for future care) still depends on a determination that the family member is a genuine volunteer. Family members who want to be paid may not be considered genuine volunteers.

<sup>3</sup> The petitioner’s position was that the Management Bulletin was an authoritative interpretation of agency regulations, published by the agency, and that the court should accord it significant deference. *See Federated American Ins. Co. v. Marquardt*, 108 Wn.2d 651, 656, 751 P.2d 18, 22 (1987).

<sup>4</sup> The order was entered in King County Superior Court case number 03-2-19755-6SEA. Petitioner was represented by Columbia Legal Services lawyers Ele Hamburger and Sharon Rice. For a copy of the order, please e-mail a request to Peter Greenfield at [peter.greenfield@columbialegal.org](mailto:peter.greenfield@columbialegal.org).