

**Testimony of Aida Fitzgerald
Senior Staff Attorney, Public Benefits Unit
Legal Aid Society of the District of Columbia**

**Before the Committee on Health
Council of the District of Columbia**

Performance Oversight Hearing Regarding the Department of Health Care Finance

February 28, 2022

The Legal Aid Society of the District of Columbia¹ submits the following testimony regarding the Department of Health Care Finance’s (DHCF) administration of the Home and Community-Based Waiver Program for the Elderly and Physically Disabled (EPD Waiver), particularly the provision of Personal Care Aide (PCA) Services to EPD Waiver beneficiaries.

EPD Waiver services allow Medicaid beneficiaries who might otherwise need to live in nursing home facilities to remain living in their homes and communities. Waiver services include, but are not limited to, PCA services, case management services, homemaker services, and adult day health program services. PCA services allow D.C. residents to safely complete activities of daily living (ADLs) – such as using the toilet, getting around inside their homes, managing their medication, preparing food, and getting dressed – when it would otherwise be dangerous for them to attempt to do so alone.

Legal Aid is concerned about the implementation of a cap on PCA services for all EPD Waiver beneficiaries at 16 hours per day² once the Federal COVID-19 public health emergency (PHE) ends.³

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 90 years, Legal Aid staff and volunteers have been making justice real – in individual and systemic ways – for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

² See October 28, 2020 update found at <https://dhcf.dc.gov/epd-waiver-amendment>.

³ Legal Aid remains concerned about the assessment tool used to determine non-financial eligibility for the EPD Waiver program and its ability to adequately capture the medical needs of D.C.’s most vulnerable residents. See Testimony before the Committee on Health, Council of

We are also concerned about the increasing number of D.C. residents seeking assistance from Legal Aid and our sister organizations because, although they have been approved for PCA services, no home health aide has been coming to their homes.

As Written, the Cap on PCA Services for EPD Waiver Beneficiaries Will Place the Most Vulnerable Enrollees at Serious Risk of Harm or Institutionalization

Effective October 1, 2020, the Centers for Medicare & Medicaid Services (CMS) approved the District's proposed EPD Waiver Amendment, which included limiting PCA services to 16 hours per day.⁴ Legal Aid is concerned that once this change goes into effect after the Federal PHE ends, it will place these vulnerable community members at serious risk of harm or institutionalization because it is unclear that other waiver services provide viable alternatives for care.

As written, the EPD Waiver Amendment provides no medical necessity exception to the 16-hour cap on PCA services. Legal Aid has represented multiple individuals who require 24 hours per day of PCA services to safely complete their ADLs and avoid institutionalization. These individuals have needed 24 hours of care for conditions such as dementia and a danger of wandering; paralysis resulting in the use of urine and colostomy bags that need to be changed every three hours to avoid infection; and limited mobility combined with incontinence that limits their ability to go to the bathroom, clean themselves up, or change their adult diaper on their own without risk of falling.

In the amendment, DHCF states that any reduction in PCA services to EPD Waiver participants who are currently receiving between 17 and 24 hours of PCA services per day will be offset by the inclusion of appropriate alternative services in the participant's person-centered plan. In public and stakeholder meetings, DHCF has indicated that Adult Day Health Programs will be the alternative waiver service most used to offset any such reductions. Legal Aid has the following concerns about this plan:

- **Capacity of Adult Day Health Programs to Meet Medical and Social Needs:** Legal Aid is concerned that the District's Adult Day Health Programs may not be medically or socially appropriate for all EPD Waiver beneficiaries who will be affected by the 16-hour cap on PCA services. We have helped beneficiaries with diverse medical and social backgrounds obtain more than 16 hours of PCA services per day, from an English-speaking woman in her 90s who has advanced dementia to a Spanish-speaking man in his 30s who has paraplegia. It is unclear whether all affected EPD Waiver beneficiaries will have meaningful access to an

District of Columbia, Performance Oversight Hearing Regarding the Department of Health Care Finance by Aida Fitzgerald, Senior Staff Attorney, Public Benefits Law Unit, Legal Aid Society of the District of Columbia, March 4, 2021 available at <https://www.legalaiddc.org/wp-content/uploads/2021/03/Legal-Aid-DHCF-Oversight-Testimony-FY20-21YTD-EPD-Waiver-FINAL.pdf>.

⁴ See supra note 3.

Adult Day Health Program capable of serving individuals with complex medical conditions such as dementia or paralysis, those who are non- or limited- English proficient, or those who are younger or middle-aged and want to engage with peer-aged adults.

- **Staffing of Shorter PCA Service Shifts:** EPD Waiver beneficiaries who use Adult Day Health Program services will still need assistance with completing morning ADLs such as bathing and dressing. At pre-PHE stakeholder meetings, Legal Aid learned about the difficulty home health agencies face staffing shifts of four hours or less. To the extent that morning preparation for Adult Day Health Program services will require four hours or less of PCA services, it is unclear how the District will coordinate providing these PCA services, particularly for those D.C. residents who do not otherwise have community support such as friends and family who are able to help complete these activities.

Approved PCA Service Hours Are Not Being Adequately Staffed

Thanks to the requirements of the Families First Coronavirus Response Act (FFCRA), D.C. has suspended the reduction and termination of PCA service hours during the Federal COVID-19 PHE. Thus, D.C. Medicaid beneficiaries have remained eligible to receive uninterrupted in-home support during a global pandemic. However even with these protections, many individuals have contacted Legal Aid and our sister organizations seeking assistance because no home health aide has been staffing their PCA service hours.⁵ These D.C. residents often do not have family, friends, or other community support in place to assist them with their daily activities when a home health aide is not available.

Although case management services are included in the EPD Waiver – and case managers should be working to ensure that individuals receive the services to which they are entitled – beneficiaries have told Legal Aid they have had difficulty reaching their EPD Waiver case manager to resolve these issues with their home health agency. In turn EPD Waiver case managers have told Legal Aid they face difficulties with getting their clients’ needs met through the current home health agency and with finding a new home health agency who will accept their clients. In one illustrative case, Legal Aid was contacted by an EPD Waiver beneficiary in January 2021 after her home health aides stopped coming to assist her. The beneficiary’s case manager organized a meeting with the beneficiary, the home health agency, D.C. Fire EMS, and Legal Aid during which the home health agency stated that they did not have any aides who were strong enough to lift the beneficiary as needed. The representative from D.C. Fire EMS attended the meeting because the beneficiary would call 911 when her aides would not show. Shortly after this meeting, the home health agency started staffing the beneficiary’s PCA service hours again.

⁵ According to a 2020 survey of home health agencies conducted by the D.C. Long-Term Care Coalition and D.C. Appleseed, over half of the respondents did not have enough Home Health Aides to staff all their clients every shift. Long Term Care Coalition: COVID-19 Impact on Home Health Aides Survey Results, available at <https://www.dclongtermcare.org/wp-content/uploads/2021/01/COVID-19-Impact-on-HHAs-Survey-Results.pdf>.

However, this beneficiary contacted Legal Aid again in January 2022 because her home health aides stopped coming again.⁶

DHCF must work with the case management and home health agencies to ensure that there is sufficient staff to meet the needs of our clients who rely on these services to protect their health and stay in their homes. Their lives and health are at risk when they do not receive the Medicaid services for which they have been found eligible.

Conclusion

Legal Aid urges DHCF to practically assess the capabilities of alternative EPD Waiver services to meet the needs of beneficiaries currently receiving over 16 hours per day of PCA services before implementing the cap and to consider establishing a medical necessity exception to the cap that would allow for PCA services in excess of 16 hours per day on an individually-determined, as-needed basis.

Further, we ask DHCF to work with other agencies in addressing the home health agency staff shortage and educating EPD Waiver beneficiaries about their rights – including their right to the arrangement of alternative services prior to the suspension of services by a home health agency – and who to contact if their rights are being violated. We also support the proposals offered by the Workforce subcommittee of the D.C. Coalition on Long-Term Care, including establishing a real livable and competitive hourly wage for Direct Care Workers such as home health aides; maintaining the enhanced rates paid during the Federal PHE after the PHE ends; and recognizing training as an allowable cost that can be factored into provider rate methodologies and reimbursement.

⁶ According to the beneficiary, the home health agency verbally told her they would stop coming based on safety concerns. However, D.C. regulations require that before a home health agency effectuates a discharge, transfer, suspension, or service termination, they must issue written notice and arrange for alternative services. See 29 DCMR 4205.15. Although Legal Aid is still reviewing this matter, it does not appear that this beneficiary's home health agency did either.