[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 114152/2007
KONSTANTINOV, ANNA
VS.
DAINES, RICHARD F.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

This motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and the cross-motion to the petition are determined in accordance with the annexed decision and order.

FILED
APR 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 23, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

ANNA KONSTANTINOV, BY HER ATTORNEY-IN-FACT, KAREN ROSS,

INDEX NO. 114152/07

Petitioner,

-against-

RICHARD F. DAINES, M.D., individually and in his official capacity as Commissioner, New York State Department of Health, and ROBERT DOAR, individually and in his official capacity as Commissioner, New York City Human Resources Administration,

Respondents.

----------X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, respondents, Richard F. Daines, M.D., individually and in his official capacity as Commissioner, New York State Department of Health ("DOH") and Robert Doar individually and in his official capacity as Commissioner, New York City Human Resources Administration, ("HRA") move by pre-answer cross-motion to the petition (motion seq. no. 001) and motion (motion seq. no. 002) to dismiss the petition on various grounds including mootness, failure to exhaust administrative remedies and failure to state a cause of action.[1]

At issue in this proceeding is whether respondents are required pursuant to Article XVII Section I of the New York State Constitution, Social Services Law § 133 and case law under Medicaid, to provide personal care attendant services to an applicant asserting and providing proof of the need for such services while an investigation is conducted to determine eligibility for

[1]The cross-motion and motion are consolidated for determination.

such services. Also at issue is whether under state and federal law an Administrative Law Judge ("ALJ") in a Decision After Fair Hearing ("DAFH") may remand a matter to a local agency for reconsideration without making a final determination.

"Medicaid is a joint federal-state program established pursuant to Title XIX of the Social Security Act (42 USC § 1396, et seq), that pays for medical care for those unable to afford it." See In re Estate of Tomeck, 8 NY3d 724, 727-728 (2007). The Medicaid program, Title XIX of the Social Security Act was created in 1965 and "provides a federal subsidy to states that choose to reimburse poor individuals for medical care." Westside Mothers v. Haveman, 289 F.3d 852, 855 (6th Cir), cert den 537 US 1045 (2002). States participate in the program through state plans for medical assistance that are approved by the Secretary of Health and Human Services. Once the plan is approved, the federal government reimburses the state for a percentage of its payments for medical care for the indigent. See 42 U.S.C. § 1396; 42 C.F.R. § 430.10.

Federal law permits each state to adopt reasonable standards for determining eligibility for and the extent of Medicaid available under that state's Medicaid program. See 42 U.S.C. § 1396(a)(17). "Personal Care Services" are optional services that states are permitted, but not required to include in their Medicaid programs. See 42 U.S.C. §§ 1396a (10), (24); 42 C.F.R. §440.167.

New York State has opted to include personal care services as part of its Medicaid Program. See Social Services Law § 365-a(2)(e). The controlling regulation, 18 NYCRR §505.14 (a)(1), defines the term "personal care services" as partial or total assistance with personal hygiene, dressing and feeding, and nutritional and environmental support functions.

Petitioner Anna Konstantinov, an 83-year old women who suffers from Alzheimers disease, applied for Medicaid coverage, and in March 2007, her application was accepted. Thereafter, by letter dated June 7, 2007 and received by HRA on June 11, 2007, Konstantinov's attorney requested that HRA award her "temporary medical assistance" in the form of 24 hours per day, seven days per week, home attendants to provide Konstantinov with personal care services. According to the petition, Konstantinov has significant impairment of both long and short term memory, is often disoriented as to time and place and, in the opinion of her treating physician, she is unable to care for her feeding, toileting, grooming and dressing needs. Konstantinov is living at home with her 87-year old sister who is afflicted with arthritis and osteoporosis and is unable to give Konstantinov the assistance and care she requires with her dressing, grooming, toileting and feeding needs. Along with the letter, the attorney submitted a medical request from Konstantinov's treating physician, a "Psychosocial and Functional Assessment" completed by a clinical social worker, a "Disability Interview Form" and a "Medical Report for Determination of Disability."

On June15, 2007, HRA sent a nurse and social worker to Konstantinov's home to evaluate her need for personal care services and on June 19, 2007, a Medicaid contracted physician met with petitioner for a further evaluation. On June 21, 2007, HRA informed petitioner's attorney that the request for personal care services had been denied. Petitioner requested a fair hearing which was held on July 19, 2007, and on August 28, 2007, the ALJ issued his DAFH reversing the denial and remanding the matter to the agency to conduct a proper evaluation in accordance with the relevant regulations. The ALJ found, *inter alia*, that the medical reports contained errors and omissions; the nursing assessment was internally

inconsistent; the agency based its determination, at least in part, on some documents that were not relevant and on other documents that were not in evidence at the hearing. However, the ALJ further found that petitioner's request was not "persuasive" on the grounds that her medical request and the comments by the social worker who evaluated her, failed to demonstrate a need for total assistance.

In this Article 78 proceeding, Konstantinov, by her attorney-in-fact Karen Ross, originally sought an order requiring respondents DOH and HRA to award her immediate personal care attendant services, on either a full-time or part-time basis pending the reevaluation, and a determination that the ALJ was required to make a final determination after the fair hearing and was barred from remanding the matter to the local agency for reconsideration. In lieu of answering, DOH cross-moved to dismiss the petition and, by separate motion, HRA also moved for dismissal.

In seeking dismissal, DOH asserts that petitioner failed to exhaust her administrative remedies since, as the result of the ALJ's remand to the local agency, there was no final determination when the petition was filed. Petitioner argues that she exhausted her administrative remedies, as the ALJ is required to make a final determination at a fair hearing, and his failure to do so, does not bar this petition on exhaustion grounds. DOH further asserts that the petition fails to state a cause of action as there is no provision for temporary Medicaid for personal care attendant services. HRA asserts that the petition fails to state a cause of action as petitioner, at the time of filing, was a recipient of community medicaid, and under the Social Service Law, the relief petitioner seeks is actually "medical assistance," defined as payment of medical benefits, which she is already receiving, i.e. community medicaid.

While these motions were sub judice, the agency completed its investigation following remand, and by notice dated December 20, 2007, it notified petitioner that the Local Medical Director determined "that you are not appropriate for Level II home care services because the Agency cannot meet your needs in a manner that promotes and protects your health and safety and does not jeopardize the safety of personnel." Konstantinov appealed that decision and a fair hearing was held on February 14, 2008. On March 12, 2008, the ALJ issued a DAFH finding her eligible for personal care services, 24 hours a day, 7 days a week, on a split shift basis, retroactive to June 8, 2007.

Respondents subsequently submitted letter briefs contending that because petitioner has now received the level of care she originally requested retroactive to the date of her application, this proceeding should be dismissed as moot. In response, petitioner argues that the proceeding should not be dismissed as moot since the issues raised are substantial and are likely to recur while evading review.

As to the threshold issue of exhaustion of administrative remedies raised by DOH, "[i]t is hom book law that one who objects to the act of an administrative agency must exhaust administrative remedies before being permitted to litigate in a court of law. The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or where resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury" (citations omitted). Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52 (1978). Moreover, the exhaustion of administrative remedies is not mandated where the issue involved is solely "one of law," Apex Air Freight, Inc.

v. O'Cleireacain, 210 AD2d 7 (1st Dept 1994), lv app den 86 NY2d 712 (1995), or "is purely the construction of the relevant statutory and regulatory framework," Herberg by Herberg v. Perales, 180 AD2d 166 (1st Dept 1992).

Here, the court concludes that the issues of whether respondents are required to provide petitioner with pre-investigative personal care services, and whether the ALJ is required to determine the personal care services at the fair hearing, are issues of law that involve the construction of the statutory and regulatory framework of the Medicaid program for the determination of applications in connection with personal care attendant services and therefore exhaustion of administrative remedies is not mandated. See Apex Air Freight, Inc. v. O'Cleireacain, supra; Herberg by Herberg v. Perales, supra.

Next, respondents' argument that the petition is moot as the DAFH issued while this motion was sub judice, granted petitioner the level of care she requested, is unpersuasive. In general, the power of a court to decide a matter only arises when there is an actual controversy in the case pending before the court. See Matter of Hearst Corp. v. Clyne, 50 NY2d 707, 713 (1980). However, the mootness doctrine, which ordinarily forbids courts from considering questions which, although once live, have become moot by passage of time or change of circumstances, can be overcome where: (1) there is a likelihood of repetition, either between the parties or other members of the public; (2) it is a phenomenon typically evading review; and (3) there is a showing that there are significant or important questions not previously passed on. See In re M.B., 6 NY3d 437, 447 (2006); Matter of Hearst Corp. v. Clyne, supra at 714-715. In Jones v. Berman, 37 NY2d 42 (1975), the Court of Appeals found that the issue of the provision of emergency public assistance was not dismissible as moot even though the petitioner was

receiving public assistance at the time of the appeal as "the questions presented [were] of public importance and interest and because of the likeliness that they would recur." Id at 57.

In support of petitioner's position that the issue is substantial and likely to recur, she asserts that it is respondents' policy to deny pre-investigative personal care services to those asserting an immediate need of such services.[2] Respondents do not deny that this is their policy, and DOH argues that there is no provision for "temporary medicaid in the form of personal care attendant services." In support, DOH points to federal regulation 42 CFR § 435.930 that Medicaid should generally only be provided to eligible individuals, and to the following statement in administrative directive 86 ADM - 7:

> There are no formal provisions in the Medical Assistance Program which would permit "presumptive eligibility" or "emergency pre-investigative coverage," nor is

---

[2]After the DAFH, petitioner addressed the mootness issued raised by respondents and submitted the affirmation of Nina Keilin stating that she is "one of the attorneys monitoring compliance by the New York State Office of Temporary and Disability Assistance (OTDA) on behalf of the State Department of Health, with an injunction in a class action, Varshavsky v. Perales, 202 AD2d 155 (1st Dept. 1994)." According to Keilin, the injunction resulted from an attempt by OTDA's predecessor to cease conducting hearings regarding medical assistance and other issues for homebound disabled individuals. The action resulted in an injunction which provided for an initial hearing via the telephone to be followed by a home hearing in certain circumstances if the decision was not fully favorable. Keilin states that over a 10-year period her office has "reviewed thousands of hearing decisions concerning Medicaid-funded personal care and other services." Keilin further avers that in cases where individuals apply for home care services for the first time or for an increase in existing services, individuals are without the requested services while their case is determined. In certain instances, after a telephone hearing services are granted; and in hundreds of other cases, OTDA reverses the local agencies determination and remands the case to the agency for reconsideration without making a final determination. In the latter group, during the remand, at times OTDA orders interim relief, but in "hundreds of cases" no such relief is granted. DOH's objection to this affirmation on the grounds that Article 78 review is limited to the record below, is inapplicable to the mootness issue.

there specific regulatory authority for local districts to pay for services for ineligible persons, even in emergency situations.

Based on these arguments and respondents' failure to deny such policy, a sufficient basis exists for concluding that the denial of pre-investigative personal care services to those asserting an immediate need of such services is a policy and presents an issue, which, like the one in Jones v. Berman, supra, is not dismissible as moot since respondents' policy applies to other Medicaid recipients in similar situations and is therefore likely to recur. Moreover, the issue is significant as the denial of such services has the potential to result in serious medical and psychological detriment to a person in need, and a substantial number of Medicaid recipients may be impacted by the policy. Finally, the issue is subject to evading review as, in many instances such as here, by the time a case involving the issue comes before the court, respondents will have already made their decisions on the ultimate eligibility for such services. See Rodriguez v. Wing, 94 NY2d 192, 196 (1999) (the issue of whether the Department of Social Services may require a recipient of temporary housing assistance to assign federal benefits to it in order for recipient to continue to receive assistance is not dismissible as moot because "the issue will recur," will "typically evade review because of the relatively short period of time in which a person would normally receive temporary emergency shelter, and because the issue "is both novel and substantial"). Based on the foregoing case law authorities, Pastore v. Sabol, 230 AD2d 835 (2nd Dept 1996), cited by respondents, is not dispositive, particularly as that decision lacks analysis of the exceptions to the mootness doctrine. Accordingly, respondents' request that the matter be dismissed as moot is denied.

Turning to the remaining aspects of the cross-motion and motion, on a pre-answer motion to dismiss pursuant to CPLR 7804(f), only the petition is to be considered, and the allegations in the petition are deemed true and are considered in the light most favorable to petitioner. See Parisella v. Town of Fishkill, 209 AD2d 850 (3rd Dept 1994); DePaoli v Board of Education, 92 AD2d 894 (2nd Dept 1983). Applying this standard, for the reasons below, the court finds that the petition provides sufficient facts to support the legal issues raised herein, so that the cross motion and motion must be denied.

The petition states eight causes of action. The first, second, third and fourth causes of action allege that DOH violated various federal and state statutes and New York City regulations by remanding petitioner's request to HRA for further consideration rather that issuing a definitive decision as to the number of hours of home care service petitioner was entitled to. The fifth, sixth, seventh and eighth causes of action allege that respondents violated Social Service Law §133 and the New York Constitution by refusing to grant petitioner temporary personal care services, and by failing to render a decision on petitioner's request for temporary personal care services within 72 hours of such request.

As indicated above, in seeking dismissal, DOH argues that there is no provision for temporary Medicaid in the form of personal care services. HRA argues that an applicant's eligibility for the personal care services is determined by an evaluation that must be conducted before services are authorized; the "medical assistance" Konstantinov seeks is defined as payment of "medical benefits" which Konstantinov was receiving as a recipient of Community Medicaid; and if temporary medical assistance exists, it only applies to the class specified in Brad H. v. City of New York, 8 AD3d 142 (1st Dept), lv app den 4 NY3d 702 (2004).

In support of the petition and in opposition to dismissal, petitioner contends that pursuant to the New York State Constitution, Social Services Law § 133 and the decisions in Brad H. v. City of New York, supra and City of New York v. Novello, 51 AD3d 544 (1st Dept 2008), DOH and HRA are required to provide petitioner with immediate personal care services while her eligibility for those services is being investigated. Specifically, petitioner argues that an applicant who has an immediate need for medicaid services is entitled to such services based on the decision in Brad H. v. City of New York, supra, where the First Department found Social Services Law § 133 applicable to Medicaid benefits, determining that "the language of the statute is clear, providing for temporary assistance and care pending an investigation relating to benefit eligibility." Brad H. v. City of New York, supra at 142-143. The First Department further found, that "[b]y definition, temporary assistance and care includes 'medical assistance for needy persons (Social Services Law § 2[18], § 363)."[3]

HRA asserts that while Brad H extends section 133 to medical assistance, this means "to be covered by Medicaid for medical expenses." HRA further argues that Social Services Law § 365-a defines "medical assistance" as payment for medical services, and that when this definition is read in conjunction with the regulatory scheme involving the multi-step evaluation process for eligibility for personal care services, "it cannot reasonably be argued that 'medical assistance' means personal care services."

---

[3]Brad H., supra, was a class action in which the members of the class were prisoners receiving mental health treatment while incarcerated. The decision found that the class members upon release, if in immediate need, were entitled to medical benefits under Medicaid pending a determination of eligibility.

The regulatory scheme provides that when a local social services department receives a request for personal care services, 18 NYCRR § 505.14 (b) provides that the Department "shall" determine the person's eligibility for medical assistance, and, that the authorization for such services must be based on: (1) a physician's order; (2) a social assessment; (3) a nursing assessment; (4) an assessment of the patient's appropriateness for personal care services and the cost effectiveness of the services. The regulation also requires an additional, independent medical review of the case if there is a disagreement between the physician's order and the other required assessments; if there is a question about the level or amount of services to be provided: or if the case involves the provision of 24 hour services. 18 NYCRR § 505.14(b)(5) states that the authorization for personal care services "shall" be completed prior to the initiation of services.

Clearly, the evaluation of an applicant's eligibility is a multi-step process and the regulations require a determination of eligibility prior to the initiation of services. However, the statutory scheme and implementing regulations neither bar nor vitiate the mandate of Social Services Law § 133 to provide temporary assistance or care, including medical assistance, to a person who appears in immediate need, pending the completion of an investigation. In fact, such assistance is authorized in certain circumstances by 18 NYCRR § 505.14(b)(5)(iv). which provides the following exception to the prior authorization rule:

> When the patient needs Level I or Level II services immediately to protect his or her health and safety and the nursing assessment cannot be completed in five business days, the social service district may authorize the services based on the physician's order and social assessment provided that: (a) the nursing assessment is obtained within 30 calendar days.

The parties do not address this exception in their submissions, and it appears to this court that it may impact on the regulatory scheme and issues raised herein. This is particularly so with respect to DOH's argument that there is no provision for temporary Medicaid for personal care services.

Based on the foregoing, the court concludes that respondents' cross motion and motion to dismiss must be denied as respondents have not sufficiently established as a matter of law that the petition fails to state a cause of action.

For similar reasons, the court denies the cross motion and motion to dismiss based on the ALJ's failure to make a determination at the fair hearing as to whether petitioner was entitled to personal care services and the number of hours of such services. While petitioner argues that the regulation requires the ALJ to make a determination, respondents move to dismiss on the grounds that there is no requirement in the regulations that the ALJ make a determination, the regulations do not prohibit a remand, and such remands are proper where further investigation is needed before a decision can be rendered. The court finds, as in the instant proceeding, Konstantinov submitted a physician's statement and social assessment with her application, 18 NYCRR § 505.14(b)(5)(iv) may impact on the determination of this issue. The parties are directed to address the significance of 18 NYCRR § 505.14(b)(5)(iv) in their submissions.

Accordingly, it is

ORDERED that the cross-motion and motion to dismiss are denied; and it is further

ORDERED that respondents are directed to serve and file their answers to the petition within 30 days of the date of this order; and it is further

ORDERED that petitioner shall serve and file reply papers within 15 days of receipt of the answers; and it is further

ORDERED that the parties are directed to appear for oral argument on the petition on June 11, 2009 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: April 23 2009

ENTER:

J.S.C.