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22 MRSA 3173-A  
Nursing Homes Physical Therapy Reimbursement

JOSEPH E BRENNAN  
ATTORNEY GENERAL



RICHARD S. COHEN  
JOHN M. R. PATERSON  
DONALD G. ALEXANDER  
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

September 14, 1978

Honorable John L. Martin  
Speaker of the House  
State of Maine House of Representatives  
Augusta, Maine 04333

Re: Implementation of L.D. 1974.

Dear Speaker Martin:

This responds to your request that this office review the draft regulations of the Department of Human Services which are intended to implement L.D. 1974 AN ACT to Allow Nursing Homes to Provide Physical and Occupational Therapy to Residents in Need of that Care, P.L. 1977, c. 646, enacting 22 M.R.S.A. § 3173-A. Your concern is that the language of the draft regulations may conflict with the legislative intent behind L.D. 1974 in that:

1. The regulations "fail to meet the Legislature's intent to allow nursing homes to provide direct physical and occupational therapy and consultation;" and
2. The regulations are "very restrictive" in limiting the area of consulting services that are reimbursable.

We recognize that a prompt response to your request was necessary. Based on the limited research we have done, we do not believe that the present draft regulations violate the law.

The problem which gave rise to the introduction of L.D. 1974 was a Medicaid regulation of the Department of Human Services which required physical and occupational therapists to submit bills directly to the Department for services rendered. The regulation, it was felt, "jeopardizes delivery of essential services to nursing home residents." [Statement of Fact, L.D. 1974]. Therefore, the intent of L.D. 1974, as initially drafted, was to order the Department to allow nursing homes to hire occupational and physical therapists and to then be reimbursed for their services by the Department as an allowable cost under its Principles of Reimbursement for Long-Term Care Facilities.

However, in hearings before the Committee on Health and Institutional Services a second issue was raised for the first time by staff of the Department. It was pointed out that the Federal Medicare program was prepared under certain circumstances to reimburse nursing homes to OT/PT services. Thus, the Department reasoned, it would be both possible and desirable to shift the burden of cost of these services to the Medicare program to a great extent. To accommodate that suggestion, L.D. 1974 was rewritten in committee and, as enacted, reads in part as follows:

"When therapy is nonreimbursable under Title XVIII of the Social Security Act (Medicare), the Department of Human Services shall reimburse an intermediate care facility or skilled nursing facility directly for the costs of physical and occupational therapy to individual residents or for professional consultants, or both, to the staff of the facility in accordance with professional standards of practice." 22  
M.R.S.A. § 3173-A, 1st paragraph.

Thus the law contains two commands, one explicit and one implicit. The explicit command is to reimburse nursing homes directly for OT/PT services and consultants under Medicaid. The implicit command is that this be done only when the services is nonreimbursable under Medicare.

With that review of the legislative intent in mind, the question then becomes whether the draft regulations violate legislative intent by requiring that OT/PT services in nursing homes be reimbursable only when the provider of those services is either

- (a) a home health agency;
- (b) an out-patient department of an acute hospital;
- (c) a skilled nursing facility certified under Medicare; or
- (d) therapist in private practice in an intermediate care facility, provided, however, that the therapist first receive the prior approval of the Department.

Certainly these regulations carry out the implicit command of L.D. 1974 in endeavoring to shift the burden of cost for OT/PT services to the Medicare program by their blanket approval of the very circumstances for the provision of OT/PT services which the Medicare regulations themselves prescribe. As to whether the prior approval requirement for therapists in private practice in ICF facilities is, on the one hand, the proper method of protecting the Medicaid appropriation from improper over-utilization for OT/PT services that might be reimbursable under Medicare, or, on the other hand, is a procedure which will "jeopardize delivery of essential services to nursing home residents" is a question that is not directly answered on the face of the law. The best that

can be said is that since the prior approval mechanism does provide for the direct reimbursement to nursing homes in cases when no other Medicare reimbursable alternative exists, it does not directly conflict with legislative intent.

The second question of whether or not the limits on the scope of consultant services reimbursable under the draft regulations conflict with § 3173-A is also difficult to answer. The word "consultants" appears only once in § 3173-A and is not defined. Nor does reference to this word appear in the Statement of Fact which accompanied § 3173-A. Recognizing that the agency has some discretion in developing regulations, we cannot say that the present draft is outside the limits of the law. We assume further that if problems in implementation of the present draft are addressed in the agency hearing on the regulations, there may be further refinements which address any concerns with the present draft.

Sincerely,



DONALD G. ALEXANDER  
Deputy Attorney General .

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