

## Medicaid Rate Reduction Is Ruled Arbitrary

BY JULIA C. MEAD

HAUPPAUGE, N.Y. — In a potentially favorable ruling for nursing homes across New York, a Suffolk County Supreme Court justice has found no rational basis for the State's retroactive reduction of Medicaid rates for patients who received restorative therapies.

The order by Acting State Supreme Court Justice Richard M. Klein to recalculate those rates is the second to address an increasing trend toward retroactive rate reductions, often accompanied by heavy penalties, in restorative therapy cases.

The previous decision, from Supreme Court in Albany County, found the State's standard — that a patient must show "actual improvement" from the therapy — violated State law because it was not codified.

But Justice Klein, in Suffolk County, went a step further. In a four-page decision in *Maggio v. DeBuono*, 98-27327, signed Nov. 19, he declared that State Health Commissioner Barbara A. DeBuono and State Medicaid director Nicholas Meister applied the standard arbitrarily and capriciously by not

considering a patient's potential for improvement before reclassifying them retroactively as ineligible for restorative therapy.

In 1998, two years after the Patchogue Nursing Center billed the State for restorative therapy for six patients, a State audit found them eligible for maintenance therapy only, which carries lower reimbursement rates.

In the Albany case, *Elcor Health Services v. Novello*, 2001 WL 881042, Justice Bernard J. Malone said the actual improvement standard was applied too rigidly and never promulgated as a proper regulation. But, in the Suffolk case, Assistant State Attorney General Patricia M. Hingerton argued an existing regulation, 10 NYCRR 86-2.30[1], supported the uncodified standard. Justice Klein allowed that an agency is given deference in interpreting the regulations it administers but was dubious the State's application of this one to newly admitted patients was rational.

"Not only does such an interpretation defy what would

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appear to be the plain meaning of the regulation, but it is also highly suspect in view of the 'new admission' qualifiers which follow in the text of the regulation and which expressly set forth the conditions under which '[n]ew admissions of less than four weeks can be marked for restorative therapy,' " he wrote.

David Yaffe, of Melville, N.Y.'s Ham-burger, Maxson & Yaffe, represented

the petitioner, Paul C. Maggio, owner of the Patchogue Nursing Center. Mr. Yaffe said his Article 78 petition involved six patients whose doctors had prescribed some form of restorative therapy after evaluating their potential for recovery. He declined to reveal specifics, citing medical confidentiality, but said such therapy, for example, could re-teach a stroke patient to feed and bathe himself. Maintenance therapy is less intensive, intending only to keep a patient's condition from deteriorating further.

"Nursing homes face serious penalties for not following a doctor's orders, and we argued that every one of these patients improved as a result of restorative therapy. But it's as if the Health Department said its not going to pay for chemotherapy for a cancer patient unless, in the end, it works. That's ludicrous," said Mr. Yaffe.

Mr. Yaffe said that with more than 600 nursing homes in New York, any decision that slowed the trend of more aggressive Medicaid re-classifications, which he observed starting about four years ago, could be "significantly enormous" for all nursing homes. While the re-recalculation Justice Klein ordered is yet to be done, Mr. Yaffe estimated his client lost \$250,000 plus interest.

Justice Klein had dismissed his petition in 1999, based on lack of evidence that the State reclassified a larger number of patients without any rational basis. Last year, the Appellate Division, Second Department, returned it to him for a decision solely on the six patients who received restorative therapies. In January, aided by the Second Department order, Justice Klein told the State to explain its rationale for doing so. That gave Mr. Yaffe the means to argue the reclassification was baseless.

In response, the State asserted two patients received only an exercise regimen, for which it said a licensed, specialized therapist was unnecessary, and the remaining four showed no improvement. The regulations for restorative therapy, specifically what is known as a documentation qualifier, requires a patient admitted less than 28 days prior to show a potential for improvement to qualify for restorative therapies, while a patient in the home for more than 28 days show actual improvement.

All six patients in the Patchogue Nursing Center were treated after they had been there 28 days, though Justice Klein's ruling negated any need to examine their medical progress.

Ms. Hingerton declined to comment on whether she planned to appeal.