



150 State Street, Suite 301 Albany, New York 12207-1698 Telephone (518) 449-2707 Fax (518) 455-8908 Web www.nyahsa.org

## MEMORANDUM

**TO:** RHCF Members

**FROM:** Dan Heim, Vice President for Public Policy

**DATE:** May 20, 2009

**SUBJECT:** NYAHSA Lawsuit on Medicaid Rebasing Delay

**ROUTE TO:** Administrator, Director of Finance

---

ABSTRACT: NYAHSA initiating a legal challenge.

### Introduction

Yesterday, NYAHSA's Executive Committee, acting on behalf of the Board of Directors, authorized the Association to file a lawsuit to protect the interests of member nursing homes. The lawsuit will challenge the three-month delay in the 2009 Medicaid rate methodology (hereinafter "rebasing") enacted in February 2009 as part of the state's Deficit Reduction Plan (DRP).

**NYAHSA members are not being asked to take any action at this time in connection with this litigation. Rather, the main purpose of this memo is to notify members of NYAHSA's plan to file suit, since a timely legal challenge will be needed to protect each member's right to relief in the event of a successful outcome.**

### Background on the Issue

As you are aware, state lawmakers enacted statutory changes in 2006 for a rebasing of nursing home Medicaid rates to reflect 2002 reported costs. For the 2007 and 2008 rate years, facilities received a total of \$305 million in phase-in payments intended to transition them into the new system, which was supposed to become fully effective on January 1, 2009. In December 2008, the Department of Health (DOH) issued a Dear Administrator Letter and initial 2009 rates reflecting the new methodology.

However, on February 3, 2009 the Legislature passed the DRP, intended to close the state fiscal year (SFY) 2008-09 budget of \$1.6 billion, and the governor signed it into law on February 4, 2009. Among the cost-cutting measures included in the DRP was a delay in implementing the

nursing home rebasing already authorized in law from January 1, 2009 to April 1, 2009.

Although the estimated state budget savings from this measure was \$22 million statewide (i.e., \$44 million provider impact), DOH's estimates strongly suggest that the actual state figure was \$75.625 million statewide (\$151.25 million provider impact). This estimate is based on one quarter (i.e., 3 months) of the \$605 million estimated full annual value of rebasing. NYAHSA is estimating that the total impact on its members of the three-month delay in rebasing is \$90.9 million.

By delaying rebasing in this manner, the state actually cut nursing home Medicaid rates back to 2006 levels (since the 2007 and 2008 rates had also included phase-in payments). In speaking with several lawmakers and staff, this was apparently not the Legislature's intent. In spite of this reality and aggressive lobbying by NYAHSA, its members and other groups, the Legislature and governor's office failed to restore this funding as part of the SFY 2009-10 budget.

### **NYAHSA Litigation**

Following extensive reviews and discussions among NYAHSA's staff, counsel, Legal Services Committee and Board of Directors, the Association's Executive Committee has authorized the filing of a legal challenge to the three-month delay in nursing home rebasing enacted in February 2009 to protect the rights of our members.

**NYAHSA will be a named plaintiff, and will be filing this action on behalf of all of its member nursing homes that participate in the Medicaid program.** All NYAHSA member nursing homes that are certified as Medicaid providers are affected to a degree by the delay in the rebasing provision and the loss of the associated Medicaid funding. NYAHSA's general counsel, the law firm of Cadwalader, Wickersham & Taft, will be representing the Association and its members in this action.

The case would likely be brought in state Supreme Court, and will be filed by June 4, 2009, which is four months from the date the DRP was enacted into law. Assuming normal timeframes apply, the court would likely hear oral argument in August/September, and rule in October/November of this year.

### **Defraying the Cost of This Action**

NYAHSA is well aware of the financial challenges facing its member nursing homes. The estimated \$90.9 million impact of the rebasing delay on our members makes this an issue of major financial significance, particularly in light of other cuts authorized in the state budget.

Given the importance of this issue and our desire to ensure that members' legal rights are protected in as cost-effective manner as possible, NYAHSA's lawsuit will cover all member facilities. This will obviate the need for individual members or smaller groups of members to file separate lawsuits on this issue, keeping the overall litigation costs down.

The initial estimated cost of initiating this challenge in state Supreme Court is \$25,000. Member nursing homes will be asked to pay a minimal special assessment to NYAHSA to fund this cost. Enclosed with this memorandum is a table that identifies for each NYAHSA member facility the estimated dollar impact of the rebasing delay, and the percentage that each facility's impact bears to the estimated total NYAHSA membership impact.

To estimate your facility's potential share of the litigation cost, simply take the percentage in the right-most column of the table for your facility and multiply it by \$25,000. For individual facilities, this amount will range from less than \$1 to approximately \$660, with the average amount at less than \$100 per facility.

Please bear in mind that these estimates relate to the commencement of the lawsuit (preparation and filing of a summons and complaint) needed to protect member rights to judicial relief, and are subject to change based on: (1) changes in DOH's underlying rebasing calculations, which will affect individual facility impacts; and (2) unanticipated developments in the course of the litigation, which could affect the overall cost of the proceeding. Counsel will otherwise work to minimize legal expenses in the litigation and any duplication of legal effort by, among other things, coordinating where possible with the New York State Health Facilities Association (NYSHFA), which is also filing suit. More information on the special assessment will be provided to you in the future.

## **Conclusion**

As previously indicated, your facility is not required to take any action at this point. We will keep you posted as the situation develops and instruct you if and when any actions are required on your part. We are also staying in communication with the NYSHFA, which is coordinating litigation on this issue on behalf of its interested members.

This litigation continues NYAHSAs long-standing commitment to protect members' interests through legal challenges to Medicaid cuts. Please contact me at (518) 449-2707, ext. 128 or via e-mail at [dheim@nyahsa.org](mailto:dheim@nyahsa.org) with any questions.

## **Attachment**

N:\NYAHSAsPolicy\dheim\Member Memos\Litigation on Rebasing Delay.doc