LEGAL SERVICES
INCORPORATED

299 Broadway
New York, NY 10007
Phone: 212-417-3700
Fax: 212-417-3891
www.mfy.org

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Via first-class mail, facsimile, and email

May 20, 2014

The Honorable Andrew M. Cuomo
Governor of New York State
New York State Capitol Building
Albany, NY 12224
Fax: (518) 474-1513

Cindy Mann, Deputy Administrator & Director
Centers for Medicare & Medicaid Services
Center For Medicaid & CHIP Services
7500 Security Boulevard, MS S2-01-16
Baltimore, Maryland 21244-1850
cynthia.mann@cms.hhs.gov

Howard Zucker, M.D., Acting Commissioner
Jason Helgerson, Medicaid Director, Deputy Commissioner
(jah23@health.state.ny.us)
New York State Department of Health
Corning Tower, Empire State Plaza
Albany, NY 12237

Re: Time for Change in New York's Managed Long-Term Care

Dear Governor Cuomo, Ms. Mann, Dr. Zucker, and Mr. Helgerson:

We write to urge you to address the serious problems with Managed Long-Term Care (MLTC) in New York State. Many of our organizations have been warning government officials about these problems for years. As a matter of sound public policy, these problems can no longer be ignored.

A May 8, 2014 *New York Times* article (attached) highlights the human and financial costs of the key problem—MLTC plans are denying services to people who need them while aggressively recruiting clients who do not. The article juxtaposes the delay, disruption, and denial of community-based long-term care services to vulnerable New Yorkers who desperately need services with the MLTC plans' illegal marketing practices and enrollment of people who do not need those services.

The article illuminates the problematic financial incentives for MLTC plans and the providers associated with those plans: **"the more enrollees, and the less spent on services, the more money the**

companies can keep." These incentives encourage the provision of services to those who do not need them and reward plans that deny services to those who need them most.

The article also highlights the life-and-death consequences of these incentives. For example, cuts in certified home health agency reimbursement led to massive dumping of people like Ena Johnson, whose 24-hour care was immediately dropped and not restored until it was too late. **"By the time lawyers won her return home with 24-hour aides, she had a bone-deep 13-inch bedsore . . ."** Advocates have reported the same types of abuses by MLTC plans. Just last week New York Legal Assistance Group filed a complaint about an 85-year-old Bronx resident who needed 24-hour care due to a stroke, vascular impairments, diabetes, and other complex needs. Her care, previously stable for seven years, was reduced to 7 hours per day after her transition into MLTC from the personal care program. As has been all too common, the MLTC plan gave no written notice, no notice of appeal rights, and as a result, no right to "aid continuing."[1]

Once MLTC fully expands to include nursing homes, another vulnerable population will be at risk. Ignoring these problems will lead to bad public policy that will be harmful to seniors, people with disabilities, and their families for years to come. Policymakers can no longer tout the claimed budgetary successes of this new program without acknowledging the undeniable human costs.

New York State will fail to meet the goals of MLTC—to reduce waste and improve patient outcomes—unless these problems are addressed now. We call for the following changes to the MLTC program immediately:

- **Implement conflict-free assessments and coverage decisions.** The current MLTC program allows financially motivated MLTC plans to conduct the clinical assessments that determine who is eligible to receive services and who is not, thus placing the highest-need and potentially costly beneficiaries at extreme risk. Enrollment should be suspended or greater oversight implemented until conflict-free assessments are fully implemented.

- **Require arms-length contracting.** New York law allows the same organizations to own and operate both the MLTC plans and the long term care facilities and home care agencies funded by those organizations. This blatant conflict of interest is structurally poisonous to the entire system of care.

- **Ensure real due process protections for consumers.** MLTC services should not be reduced or terminated without procedures that meet due process standards of notice, aid continuing, and fair hearing rights. So far, New York State has failed to ensure continued provision of services and MLTC plans have cut services illegally. Standardized notices must be developed with

[1] The attached case example, described on page 3, further illustrates this problem.

consumer input. Providers found to have cut services without providing due process should be fiscally sanctioned and required to submit plans of correction to ensure future compliance.

- **End mandatory exhaustion of the internal appeal process.** The requirement that consumers "exhaust" internal appeals before requesting a fair hearing should be eliminated, because consumers are not notified of their appeal rights at all, let alone the obligation to request an internal appeal. Recourse to a fair hearing is essential. The attached case example shows how a consumer's services were cut from 12 to 8 hours per day for over five months until legal advocacy restored them last week. In the meantime, the 96-year-old man fell three times, requiring two hospitalizations. No notice was given, let alone notice of the requirement to request an internal appeal or the right to "aid continuing." *See* case example, attached.

- **Employ robust and effective surveillance.** Oversight of MLTC plans and providers is woefully inadequate and MLTC complaints, whether made through the MLTC complaint line or via other channels, are not adequately investigated and resolved. The State must invest more resources in surveillance. This could include:
    - expeditious implementation of the managed care ombudsman program with safeguards to ensure its independence from State and industry interference;
    - increased funding of the LTC Ombudsman Program, which will inevitably be a "first responder" on issues, particularly for consumers in residential care settings;
    - requiring an annual Office of Medicaid Inspector General audit of the MLTC program (including assessments of plans and providers);
    - using "secret shoppers" to look out for marketing fraud and monitor responsiveness of plan call centers;
    - training staff to identify fraudulent practices;
    - suspending enrollment for longer periods when plans engage in improper marketing and enrollment practices as well as other illegal practices such as due process violations; and
    - involving consumer advocates to identify best practices.

- **Weed out deficient MLTC plans.** The State should end its policy of letting any willing plan join the MLTC program and engage in an active procurement process. It should remove MLTC plans that violate the law or consistently fail to improve patient outcomes. The plans should be required to prove that complaints represent "one-off" incidents, by demonstrating actual compliance with adequate working systems and procedures. The State should periodically halt MLTC enrollment to assess plan performance with input from consumer advocates.

- **Ensure greater transparency and accountability**. There is no public information currently available on MLTC complaint and appeal rates.

Medicare beneficiaries can access information, through the star ratings system, about plan performance in dealing with complaints and appeals. The State Department of Financial Services' annual report on commercial insurers includes statistics on complaints and appeals. MLTC enrollees deserve at least the same level of transparency and accountability. The formal evaluation of MLTC plans must begin incorporating complaint and appeal information and such data must be made publicly available. Additionally, the State's MLTC reports must include plan-specific data on medical loss ratios, care management ratios, and the extent of provision of community-based services. The recent 2013 report presents only a partial picture of plan performance, much of it not plan-specific.

- **Protect nursing home residents in the enrollment process.** As the State rolls out expansion of MLTC to include nursing home care and residents, these vulnerable individuals must be protected. While existing residents will not be required to enroll in plans, they will be allowed to enroll in plans, and as such, will be vulnerable to marketing pressures. An enforceable informed consent requirement should be established, where plans must provide accurate and complete information about eligibility and choice and be able to document a consumer's consent to enrollment – or the consent of their designated representative for those who lack capacity. This is particularly important as the MLTC program begins taking on nursing home patients who are then passively enrolled into Fully Integrated Duals Advantage Plans. Additionally, DOH oversight of nursing homes must be more rigorous.[2]

- **Delay expansion of mandatory MLTC to new upstate counties and to the nursing home population** until the protections requested above are in place. In many upstate counties there are just one or two MLTC plans with only a handful of enrollees. No recipient of stable community-based services should be required to transition to these plans until their capacity is assured and the protections proposed above are incorporated.

With the deficiencies in the State's MLTC program clearly exposed, we ask you to take action so that the most vulnerable New Yorkers do not continue to suffer. We would welcome the opportunity to meet with you to discuss our proposals. Please contact Jota Borgmann at (212) 417-3717 or jborgmann@mfy.org if you would like to request a meeting with our group.

Sincerely,

Jota Borgmann, Senior Staff Attorney
MFY Legal Services, Inc.

[2] Other concerns regarding expansion of MLTC and mainstream managed care to include nursing home population are stated in a letter to CMS and DOH dated March 14, 2014, posted at http://www.wnylc.com/health/news/58.

On behalf of:

Maria Alvarez, Executive Director
NY StateWide Senior Action Council, Inc.

Valerie Bogart
New York Legal Assistance Group

Bruce Darling, Executive Director
Center for Disability Rights

Susan M. Dooha, Executive Director
Center for Independence of the Disabled, New York

Gene Doyle, Executive Director
People Organized for Our Rights, Inc. (P.O.O.R.)

David Goldfarb, Managing Partner/Attorney
Goldfarb Abrandt Salzman & Kutzin LLP

Toby Golick, Director of Clinical Legal Education
Cardozo Law School

Paula Goolcharan, Program Director
New York City Long Term Care Ombudsman Program

Mia R. Kandel, Director, Health and Wellness Initiatives
Lenox Hill Neighborhood House

Jed A. Levine, Executive Vice President
Alzheimer's Association, New York City Chapter

Geoff Lieberman, Executive Director
Coalition for the Institutionalized Aged and Disabled

Amy E. Lowenstein
Empire Justice Center

Suzanne Mattei
New Yorkers for Patient & Family Empowerment

Lindsay Miller, Executive Director
New York Association on Independent Living

Richard Mollot, Executive Director
Long Term Care Community Coalition

Roberta Mueller, Co-Director of Disability Justice
New York Lawyers for the Public Interest

Rebecca Novick, Supervising Attorney, Health Law Unit
The Legal Aid Society

Bryan O'Malley
Consumer Directed Personal Assistance Association of New York State

Cynthia Rudder, Ph.D, Consultant

Leslie Salzman, Director
Cardozo Bet Tzedek Legal Services

Heidi Siegfried
New Yorkers for Accessible Health Coverage

Ken Traub and Janet Gelein, Co-chairs, Elder Justice Subcommittee
Metro Justice of Rochester

Deborah F. Truhowsky, Esq.
Law Firm of D.F. Truhowsky

Felice Wechsler, Principal Attorney
Mental Hygiene Legal Service, First Department

Kimberly Williams, LMSW, Director
Mental Health Alliance of New York

cc (via email):

Hon. Richard N. Gottfried, Chair, New York State Assembly Health Committee

Hon. Kemp Hannon, Chair, New York State Senate Health Committee

Hon. Joan Millman, Chair, New York State Assembly Aging Committee

Hon. David I. Weprin, Chair, New York State Assembly Task Force on People with Disabilities

Suzanne Bosstick, CMS (suzanne.bosstick@cms.hhs.gov)

Barbara Edwards, CMS (barbara.edwards@cms.hhs.gov)

Jessica Schubel, CMS (jessica.schubel@cms.hhs.gov)

Mark Kissinger, Deputy Commissioner, NYS Dept. of Health, Division of Long

Term Care (mlk15@health.state.ny.us)