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50th Anniversary: Mobilizing for Justice

October 3, 2013

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Re: Written comments on the Draft Scoping Document for Environmental Impact Statement for the Jewish Home Lifecare, Manhattan Replacement Nursing Facility Project (Certificate of Need Project #121075 C)

To Whom It May Concern:

MFY Legal Services, Inc. submits these comments in opposition to Jewish Home Lifecare's request to construct a large-scale, segregated institution for 414 people with disabilities.

I. MFY's Work with Nursing Home and Adult Home Residents

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy.

Last year, MFY launched its Nursing Home Residents Project (NHRP) to provide information and advocacy for nursing home residents and their families who are struggling with abuse, neglect, civil rights violations, improper discharge planning, and unfair consumer practices. MFY tracks trends in the complaints that it receives, and, where necessary, engages in policy advocacy or brings impact litigation to resolve systemic problems facing nursing home residents. MFY also provides training and educational sessions to nursing home residents and family councils. MFY has a toll-free help line for nursing home residents and their families: 855-444-6477 (Monday through Friday from 10:00am to 5:00pm).

MFY launched the NHRP to fill the void left when Friends and Relatives of the Institutionalized and Aged (FRIA) suspended its operations in 2011. MFY recently released a new edition of *Nursing Homes and Alternatives- What New York Families Need to Know*. This essential guide, originally published by FRIA in 1981, has been called “the bible of long-term care for the elderly and their caregivers.” Used by thousands of families and advocates since it was first published, *Nursing Homes and Alternatives* remains a crucial resource for anyone who cares about the well-being of a friend or loved one in need of care. It is now available for free at www.mfy.org.

The NHRP is modeled on MFY’s ground-breaking Adult Home Advocacy Project, which provides trainings, advice, and legal representation that have resulted in systemic reforms that have benefited thousands of New York’s adult home residents. MFY began working collaboratively with the Coalition of Institutionalized Aged & Disabled in 1992 to reach out to and assist adult home residents. Since then, MFY has provided legal services to residents of adult homes throughout New York City, offering know-your-rights trainings in adult homes and representing residents in individual matters and affirmative litigation.

On July 23, 2013, three adult home residents who are represented by MFY and co-counsel filed *O’Toole et al. v. Cuomo et al.* on behalf of a class of similarly situated residents. This class action lawsuit claims that the New York State has violated the Americans with Disabilities Act. Under the proposed settlement of this lawsuit, every adult home resident who qualifies will have the choice to move to community housing within five years. The State will fund at least 2,000 units of supported housing for adult home residents and more if necessary.

II. The New York State Department of Health Should Deny Jewish Home Lifecare’s Request to Construct the Proposed Institution

The New York State Department of Health (DOH) should deny Jewish Home Lifecare’s request to construct the proposed institution for at least three reasons: 1) If it approves the proposed institution, the DOH would be violating the Americans with Disabilities Act (ADA); 2) If it approves the proposed institution, the DOH would be neglecting its duty to require appropriate emergency preparedness; and 3) Jewish Home Lifecare’s proposal violates the Fair Housing Act (FHA), the New York State Human Rights Law (NHSRL), and the New York City Human Rights Law (NYCHRL).

A. Approving the Proposed Institution would Violate the ADA

The ADA prohibits discrimination against people with disabilities in three main contexts: employment, public services, and public accommodations. To be eligible for ADA protection, a person must satisfy the ADA’s definition of “disability.” People are “disabled” for ADA purposes if they: (1) have a physical or mental impairment that substantially limits one or more major life activities, (2) have a record of that impairment, or (3) are “regarded as” having that impairment.¹ In 2009, Congress unanimously passed the ADA Amendments Act.² The ADA

¹ See 42 U.S.C. § 12102(1) (defining the term “disability”).

² See ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102).

Amendments Act includes a non-exclusive list of examples of major life activities relevant to determine whether an individual is disabled.³

Although one might think of nursing homes as being places where older people live, they are actually places where people with disabilities live. Describing people who live in nursing homes as people with disabilities is more accurate than describing them as older people for at least two reasons: 1) a significant percentage of nursing home residents are younger than 60; and 2) in order to qualify to live in a nursing home, a person has to have a physical or mental impairment that substantially limits one or more major life activity.

The ADA focuses on the segregation of individuals with disabilities and the right they have to participate in society. The Congressional findings emphasize that “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society” The findings also note that, “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁴ The ADA explains that “the Nation’s proper goals regarding individuals with disabilities” include assuring “full participation” and “independent living.”⁵ Title III of the ADA, for example, emphasizes the importance of “integrated settings” by requiring public accommodations such as stores to offer “[g]oods, services, facilities, privileges, advantages, and accommodations” to individuals with disabilities “in the most integrated setting appropriate to the needs of the individual.”⁶

Title II of the ADA protects the rights of individuals with disabilities to participate in the services, programs, and activities of public entities.⁷ A “public entity” is a state or local government or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁸ Title II clearly covers the DOH. The ADA requires public entities like the DOH to make “reasonable modifications to rules, policies, or practices” for qualified individuals with disabilities.⁹

The regulations for Title II flesh out the ADA’s prohibitions against discrimination by public entities.¹⁰ These regulations elaborate on the ADA’s focus on the right to full and equal participation in civil society.¹¹ One Title II regulation echoes the abovementioned “most integrated setting” language from Title III of the ADA: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of

³ *See id.* (“[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”).

⁴ *Id.* § 12101(a)(2).

⁵ *Id.* § 12101(a)(7).

⁶ *Id.* § 12182(b)(1)(B).

⁷ *Id.* § 12132.

⁸ *Id.* § 12131(1).

⁹ *Id.* § 12131(2).

¹⁰ 28 C.F.R. § 35.130.

¹¹ *See, e.g., id.* § 35.130(a) (“No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity”); 35.130(b)(2) (“No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity”).

qualified individuals with disabilities.”¹² The preamble to the Title II regulations explains that the “most integrated setting” for an individual is “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”¹³ The meaning of this regulation, which is generally referred to as the ADA’s “integration mandate,” is at the heart of the Supreme Court’s landmark decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

The Department of Justice (DOJ) has “consistently advocated” that “undue institutionalization qualifies as discrimination ‘by reason of . . . disability.’”¹⁴ The Supreme Court’s decision rested on the ADA’s recognition that “unjustified ‘segregation’ of persons with disabilities [is] a ‘for[m] of discrimination.’”¹⁵ Unjustified institutional isolation discriminates against people with disabilities by making them choose between receiving necessary medical services and “participati[ng] in community life.”¹⁶

If it were to approve Jewish Home Lifecare’s request to construct the proposed institution, the DOH would be sentencing over 400 people with disabilities to life in a completely segregated environment where they would have little if any chance for interaction with people who do not have disabilities. Approval of this proposed institution would almost certainly be a violation of the ADA. The DOJ is currently litigating a number of *Olmstead* challenges against states based on their use of nursing homes.¹⁷

Approving the proposed institution would also be a considerable step backwards for New York State. The Medicaid Redesign Team has specifically found that “[t]here is an over-reliance on State psychiatric hospitals, adult homes and nursing homes, partly due to the system’s inability to assign responsibility for integrated community care.”¹⁸ Many prison-like State psychiatric hospitals have already been closed. By settling *O’Toole et al. v. Cuomo et al.*, Governor Cuomo has taken significant step to rectify the errors his predecessors made by segregating people with mental illness in 23 large adult homes. Yet, of the 23 large adult homes covered by the *O’Toole* litigation, only one has more beds than the institution that Jewish Home Lifecare is proposing to build. During this time of considerable progress away from segregating people with disabilities in large institutions, the DOH should not even consider approving a huge new institution in which to warehouse people with disabilities.

¹² 28 C.F.R. § 35.130(d).

¹³ *Id.* § 35.130(d), App. A, p. 450 (1998).

¹⁴ *Olmstead*, 527 U.S. at 587.

¹⁵ *Id.* at 600 (citing 42 U.S.C. § 12101(a)(2) and § 12101(a)(5)).

¹⁶ *Id.* at 601.

¹⁷ See DOJ, Participation by the United States in *Olmstead* Cases, http://www.ada.gov/olmstead/olmstead_cases_list2.htm#usparty.

¹⁸ New York State Department of Health, A Plan to Transform the Empire State’s Medicaid Program: Better Care, Better Health, Lower Costs 18 (emphasis added), available at http://www.health.ny.gov/health_care/medicaid/redesign/docs/mrtfinalreport.pdf

B. Approving the Proposed Institution would Neglect the Duty to Require Appropriate Emergency Preparedness

Hurricane Sandy was a devastating illustration of the critical need for reform of New York’s system for evacuating residents of nursing homes and adult care facilities during a natural disaster or emergency. The DOH and other relevant state agencies must formulate and implement a comprehensive statewide plan for disaster and emergency preparedness plans at nursing homes and assisted living facilities. To accomplish this, the DOH should:

- Review existing reports and studies on disaster and emergency preparedness in nursing homes and other health facilities;
- Request information from relevant stakeholders, including residents, advocacy groups, facility operators, and government entities, as needed; and
- Conduct a study of the evacuation of nursing homes and assisted living facilities during Hurricane Sandy, with the goal of developing regulations to address problems.

Numerous reports paint an alarming picture of New York’s lack of a comprehensive evacuation plan for residents of these facilities.¹⁹ These reports also identify problems and provide recommendations for the DOH to strengthen its guidelines.

These reports found that:

- The DOH guidelines for evacuation plans are inadequate, and the DOH does not check the quality of nursing home evacuation plans.
- Facilities do not have adequate evacuation plans, and most, if not all, do not have plans that take into account the potential need for a regional evacuation of multiple facilities.
- New York City’s “58 nursing homes that are located in hurricane evacuation zones are *completely unprepared* to evacuate the thousands of special needs individuals who will require assistance during a hurricane emergency.”²⁰
- Evacuation plans, to the extent that they even existed, were meant for evacuating single institutions during events such as a fire or a localized power outage.

The experiences of residents living in nursing homes and adult care facilities during Hurricane Sandy support these reports’ conclusions. Many residents were evacuated to other facilities, resulting in facilities that were severely overcrowded. Residents were transferred without proper medication or medical documentation, and it was not clear what facility bore the responsibility of

¹⁹ See, e.g., Department of Health and Human Services (HHS), OIG, Supplemental Information Regarding the Centers for Medicare & Medicaid Services' Emergency Preparedness Checklist for Health Care Facilities, OEI-06-09-00271 (April 13, 2012); Department of Health and Human Services (HHS), OIG, Gaps Continue to Exist in Nursing Home Emergency Preparedness and Response During Disasters: 2007-2010, OEI-06-09-00270 (April 2012); Manhattan Borough Present Scott Stringer, No Way Out: An Analysis of the New York State Department of Health’s Role in Preparing Nursing Homes for Emergencies (December 2006); Richard L. Brodsky, Chairman, Committee on Corporations, Authorities, and Commissions, New York State Assembly, The Final Report on New York City Emergency Response and Evacuation Plans in the Event of a Weather-Related Emergency (March 23, 2006).

²⁰ New York State Assembly Committee on Corporations, Authorities, and Commissions, Final Report on NYC Emergency Response and Evacuation Plans in the Event of a Weather-Related Emergency (March 2006) (emphasis added).

providing care for the evacuated residents. After the residents were transferred, family members or legal guardians were not able to locate them.

The DOH already faces significant challenges in making sure that nursing homes have adequate emergency preparedness plans. The institution proposed by Jewish Home Lifecare poses a number of preparedness challenges that would be difficult if not impossible to overcome. Based on our experience working with adult home and nursing home residents who have lived through hurricanes and other emergencies, we do not think that Jewish Home Lifecare will be able to come up with a viable emergency preparedness plan that would allow it to evacuate in a timely manner the over 400 people with disabilities who would live in the proposed 20-story institution. Approving this proposed institution may therefore lead to catastrophic consequences.

C. Jewish Home Lifecare’s Proposal Violates the FHA, NYSHRL, and NYCHRL

According to its website, Jewish Home Lifecare’s proposed institution would “[f]eature affinity floors: Kosher households; LGBT households.”²¹ By stating a preference or a limitation for residents based on their race, religion, or sexual orientation, Jewish Home Lifecare is violating the FHA, NYSHRL, and NYCHRL.

The FHA prohibits discrimination on the basis of race, color, religion, sex, national origin, disability, familial status.²² The NYSHRL and NYCHRL prohibit discrimination on the basis of an even wider range of protected classes, including sexual orientation.²³ The FHA specifically prohibits advertising or making any statement that indicates a limitation or preference based on a protected characteristic.²⁴ Although the FHA does not cover sexual orientation, the NYSHRL and the NYCHRL do.

Because the FHA’s definition of “dwelling” includes “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence,”²⁵ the FHA clearly covers nursing homes. The NYSHRL and NYCHRL cover an even broader range of “housing accommodations” than the FHA.²⁶

Based on these fair housing laws, a nursing home cannot assign rooms or beds based on factors related to protected characteristics. Given that Jewish Home Lifecare is violating these civil

²¹ See The Living Center – Fast Facts, <http://www.jewishhome.org/the-changing-face-of-aging/a-new-model-of-nursing-home/a-green-house-grows-in-manhattan-the-living-center/the-living-center-fast-facts>.

²² 42 U.S.C. § 3604.

²³ See, e.g., N.Y. Exec. Law § 296(5) (prohibiting discrimination based on “race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status.”); N.Y. Admin. Code tit. 8, ch. 1, § 8-107(5)(a)(1) (prohibiting housing discrimination based on “actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person, or because children are, may be or would be residing with such person or persons”).

²⁴ 42 U.S.C. § 3604(c).

²⁵ 42 U.S.C. § 3602(b).

²⁶ N.Y. Exec. Law § 292(10) (defining “housing accommodation” “includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings”); N.Y. Admin. Code tit. 8, ch. 1, § 8-102(10).

rights laws by proposing to segregate residents based on religion, sexual orientation, and other protected characteristics, the DOH should deny its proposal.

III. Conclusion

For the above-stated reasons, the DOH should deny Jewish Home Lifecare's request to construct a large-scale, segregated institution for 414 people with disabilities. Thank you for giving MFY the opportunity to submit these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin M. Cremin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kevin M. Cremin