



L E G A L

S E R V I C E S

I N C O R P O R A T E D

TESTIMONY FOR A HEARING ON:

**Medicaid Transition to
Care Management for Long-Term Care**

PRESENTED BEFORE:

**THE NEW YORK STATE ASSEMBLY COMMITTEE ON HEALTH
RICHARD N. GOTTFRIED, CHAIR**

**THE NEW YORK STATE ASSEMBLY COMMITTEE ON OVERSIGHT,
ANALYSIS AND INVESTIGATION
ANDREW HEVESI, CHAIR**

PRESENTED BY:

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I. Introduction

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 civil legal issues, prioritizing services to vulnerable and underserved populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice and representation to more than 8,000 New Yorkers each year. MFY serves residents of institutions, including adult homes and nursing homes, as well as people seeking to maintain their homes in the community. We work to ensure that people receive necessary health services while addressing abuse, fraud and waste.

The transition to Managed Long Term Care (MLTC) greatly impacts our clients. Misinformation about MLTC is pervasive and many consumers are receiving unnecessary services or are at risk of unnecessary institutionalization. The stated goals of MLTC—to reduce waste and improve patient outcomes—will not be achieved if the State does not provide robust oversight and ensure due process protections during its implementation.

MFY shares the concerns and supports the recommendations of the Coalition to Protect the Rights of New York’s Dual Eligibles. We reiterate and expand on those recommendations here and provide specific examples of how our clients are disserved and taxpayer money is wasted under this new system.

II. Key Recommendations

1. Provide adequate resources for the Department of Health (DOH) to:
 - a. engage in robust oversight of MLTC plans to prevent unnecessary institutionalization and ensure compliance with the Supreme Court’s *Olmstead* decision and the Americans with Disabilities Act (ADA); and
 - b. ensure that consumers have readily available information about MLTC plans that is culturally and linguistically competent and accessible to people with disabilities so that all consumers can make informed choices.
2. Incentivize providing community-based services instead of institutional care by ensuring full coverage of nursing home care within MLTC plans rather than relegating nursing home coverage to fee-for-service Medicaid;
3. Create an entity separate from the MLTC plans to make unbiased initial eligibility determinations;
4. Create a Uniform Assessment Tool for use by MLTC plans in determining medical necessity of services and train the relevant staff of MLTC plans to implement its use;
5. Ensure due process protections for consumers by eliminating the requirement that they exhaust the internal appeal process and by providing “aid continuing” pending an internal appeal or fair hearing;

6. Create an Ombudsprogram to investigate consumer complaints and monitor consumer placements into nursing homes;
7. Create an ADA compliance appendix to the contract with MLTC plan providers, with penalties to providers who fail to address noncompliance;
8. Require MLTC plans to adopt model notices that are readable and accessible to people with disabilities;
9. Protect the consumers' right to change MLTC plans at any time.

III. The Mass Enrollment of Adult Home Residents in MLTC Has Increased Waste

Adult homes are congregate residential facilities that were originally created to provide housing, meals and basic care for elderly people who do not need nursing care. Today, they serve a large number of people with psychiatric disabilities who lack viable community-based housing and supports. Adult home residents are isolated and depend on the home to provide most of their basic needs, including meals, case management services, and access to a small monthly personal needs allowance. This creates a power dynamic that leaves residents vulnerable to exploitation and fearful of retaliation if they speak up about their rights.

Numerous reports have documented overbilling, unnecessary medical services, and Medicaid abuse in adult homes.¹ Adult home residents regularly report that they are pressured to attend medical appointments and day treatment programs that they do not want or need. Meanwhile they lack access to health services, like basic dental care or hearing aids that they do want and need. The State's move to managed care has the potential to change this, but implementation has led to unnecessary enrollment of adult home residents in MLTC plans and services and, thus, even greater waste.

During spring 2012, MFY began receiving reports that MLTC plans were conducting aggressive campaigns to enroll adult home residents. One plan went to adult homes in New York City, Long Island, and upstate and enrolled large numbers of residents. Residents were told, inaccurately, that they were required to enroll in an MLTC plan at that time and, if they did not do so, they might not be able to have a home health aid in the future when they needed one or continue to live at the adult home. Assessments of residents in one home indicated that all of the residents needed assistance with feeding; however, state regulations do not permit a resident to remain in an adult home if they needed that level of assistance.

The DOH took action in response to our reports and the plan was required to suspend enrollment for 45 days. It is not clear, however, what action was taken to disenroll the residents who enrolled under false pretenses. We do know that some residents have had

¹ See, e.g., *Disability Advocates, Inc. v. Paterson*, 653 F.Supp.2d 184 (E.D.N.Y. 2009); New York State Commission on Quality of Care and Advocacy for Persons with Mental Disabilities (CQC), *A Review of Assisted Living Programs in "Impacted" Adult Homes* (2007); CQC, *Health Care in Impacted Adult Homes: A Survey* (2006); CQC, *Adult Homes Serving Residents with Mental Illness: A Study on Layering of Services* (2002); *The New York Times*, *Broken Homes* (April 28-30, 2002).

difficulty requesting disenrollment after they were coerced to sign up for an MLTC plan.

Residents in another adult home reported that they were told by the home's administration that they must sign up for an MLTC plan and receive home care assistance if they regularly applied creams, used eye drops, or received monthly injections of a medication. The operator of this adult home is also the operator of the home care agency located on the ground floor of the facility.

We have received reports from residents in many other homes about similar practices. Some residents have been told they "must" sign up for MLTC even though they do not require 120 days or more of personal care assistance in a year. They have been told that they must join a specific plan and, because their only access to information is through the people who are marketing a particular plan or who have connections to a provider covered by that plan, residents are not educated about their full range of choices. Residents in one home reported that they were encouraged to enroll in an MLTC so that they could have extra assistance with bathing or cleaning their room. These residents had not previously received assistance with bathing, and housekeeping services are already provided as part of the elevated facility rate that the State pays for Supplemental Security Income recipients living in adult homes.

For adult home residents, the implementation of MLTC has resulted in the provision of unnecessary or duplicative services, such as homecare services and housekeeping services that adult homes are already required to provide, at the waste of taxpayer dollars. Receiving unnecessary services now could encourage greater dependence and hasten the need for a higher level of care in the future. While the DOH has responded each time we alert it to resident concerns, we are unaware of any systemic monitoring of these kinds of exploitative practices or any reporting of such practices in adult homes aside from that done by MFY and Nassau Suffolk Legal Services Committee. We are concerned that these reports are indicative of more widespread marketing practices to near-captive audiences like adult home residents.

In light of our experiences working with adult home residents we recommend:

- Increasing staffing and resources to ensure that the DOH provides oversight critical to protecting against consumer exploitation and misinformation;
- Requiring the DOH to publicize information about the type and extent of services authorized by each MLTC plan;
- Requiring the DOH to conduct community education programs to inform consumers, family members and advocates about MLTC plan choices; and
- Providing funding to community-based organizations for educational outreach to consumers and consumer advocates.

IV. Nursing Homes Are Difficult to Leave and Increase Costs While Unnecessarily Institutionalizing People Who Can Live in the Community with Supports

MFY constantly receives calls from nursing home residents who do not need skilled

nursing care and could live in their own apartment. Like adult homes, nursing homes house a significant number of people who lack viable community-based housing, including people with psychiatric disabilities.² But they also house people who have housing in the community and are simply “stuck” in a nursing home. It can be extremely difficult for people who could receive adequate care in the community to leave a nursing home and return to their affordable apartments in the community because the financial incentive for the nursing home to keep the resident is so great.

One MFY client, “Mr. C.,” had a very affordable, rent-controlled apartment and no ongoing medical needs, but he did have a psychiatric disability and needed some personal assistance at home. MFY spent two years advocating for the nursing home to conduct proper discharge planning and secure appropriate community services. The home care agency required him to provide a “backup” contact before he returned to his apartment. For two years, Medicaid paid for this client’s unnecessary stay in a nursing home when he could have been living in his apartment. This was before the switch to MLTC. Under the new system, Mr. C. would have faced many more obstacles to returning home.

First, Mr. C. would likely require enrollment in an MLTC plan since nursing home care is still covered through fee-for-service Medicaid. Then he would need to get approval for homecare services. If he were denied, he would have to request an internal appeal with that plan, then request a fair hearing if his appeal were denied. This process would have to be repeated for each plan that denied him services. There would be no financial incentive for any MLTC plan to approve Mr. C. for home care services if he was not already enrolled in the plan. Many of these same issues would arise if Mr. C. faced a reduction in his home care services now.

In our work to assist nursing home residents to return to the community, we are regularly told by nursing home staff that it is too difficult to gain approval for home care services. This is used as a way to justify not helping nursing home residents apply for home care services. It results in nursing homes either keeping people in the nursing home or moving them to another institution like an adult home.

In light of our experiences working with nursing home residents, we recommend:

- Incentivizing the provision of community-based services instead of institutional care by ensuring full coverage of nursing home care within MLTC plans; specifically, requiring MLTC plans to contract with all nursing homes that meet specified quality measures;
- Creating entity separate from the MLTC plans to make unbiased initial eligibility determinations;
- Creating a Uniform Assessment Tool for use by MLTC plans in determining medical necessity of services and training of the relevant staff of MLTC plans to implement its use;

A Review of Assisted Living Programs in “Impacted” Adult Homes (2007); CQC, Health Care in Impacted Adult Homes: A Survey (2006); CQC, Adult Homes Serving Residents with Mental Illness: A Study on Layering of Services (2002); The New York Times, Broken Homes (April 28-30, 2002).

² See Joseph S. v. Hogan, 561 F.Supp.2d 280 (EDNY 2008).

- Ensuring due process protections for consumers by eliminating the requirement that they exhaust the internal appeal process with a plan before they can request fair hearings and provide “aid continuing” pending an internal appeal or fair hearing; and
- Creating an Ombudsprogram to investigate consumer complaints and monitor consumer placements into nursing homes.

V. Older People and People with Disabilities Are at Risk of Unnecessary Institutionalization

MFY has surveyed the information available to consumers about MLTC and has examined how a consumer might navigate the system when questions or problems arise. Notices are difficult to read and inaccessible to people with disabilities. When we have called MLTC plans, many plan representatives have been unable to state whether they have appeals staff at all, or have stated that they have little or no experience handling appeals. As a result of a lack of training and experience, we have found that plans are frequently unable to provide information about how to appeal a reduction or termination of services or stated that they had never processed an appeal. Individuals compelled by the state to enroll in managed care are already suffering the effects of these deficiencies. When an 87 year-old Medicaid recipient requested a fair hearing regarding a reduction in home care services, he was charged \$170 by his MLTC plan for copies of the documents that the plan intended to provide at the fair hearing.³ These violations of basic ADA and due process rights pose significant problems for people most in need of home care services.

MFY works to ensure that when the State provides services to people with disabilities—including people with age-related disabilities or psychiatric disabilities—it does so in the most integrated setting that is appropriate to their needs as required by the ADA. The ADA regulations explain 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. 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 *Olmstead* decision.⁴

In *Olmstead*, the Supreme Court emphasized that the Department of Justice has “consistently advocated” that “undue institutionalization qualifies as discrimination ‘by reason of . . . disability.’”⁵ The Supreme Court explained why “unjustified segregation” is discrimination:

First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely

³ See fair hearing decision dated November 7, 2011 at: http://www.otda.ny.gov/fair%20hearing%20images/2011-12/Redacted_5944023P.pdf

⁴ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁵ *Id.* at 597.

diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.⁶

When governmental entities fund or provide services in restrictive settings such as adult homes and nursing homes to people with disabilities who could live in the community, they are violating the ADA. Adequate oversight of MLTC plans is important because they now determine access to home care services. Home care services allow older people to age in place with dignity and allow people with disabilities to live in community settings that are more integrated, less restrictive, and ultimately less expensive than institutional settings such as adult homes or nursing homes. For these reasons, we recommend:

- Requiring the DOH to conduct proactive monitoring of service reductions by MLTC plans and sharing the data it collects with consumer advocates and the ombudsprogram;
- Creating an ADA compliance appendix to the contract with MLTC plan providers, with penalties to providers who fail to address noncompliance;
- Requiring MLTC plans to adopt model notices that are readable and accessible; and
- Protecting the consumers' right to change MLTC plans at any time.

VI. Conclusion

MFY Legal Services thanks the Committee on Health and the Committee on Oversight, Analysis, and Investigation for holding this hearing. We are committed to helping the State develop and implement a system of Managed Long Term Care that saves the state money, complies with the ADA and *Olmstead*, and protects its most vulnerable populations.

⁶ Id. at 600-01 (citations omitted).