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Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

February 1, 2017

Elder #3

S.2007; Part E, Sec. 1	By: BUDGET
A.3007; Part E, Sec. 1	By: BUDGET
	Senate Committee: Finance
	Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE PROPOSAL TO REQUIRE A NURSING HOME LEVEL OF CARE AS A CONDITION OF MANAGED LONG TERM CARE ELIGIBIILITY

This bill would add a requirement that an individual require nursing home level of care as a condition for Managed Long Term Care ("MLTC") eligibility. The Governor's Memorandum in Support incorrectly explains, "Those enrollees excluded from MLTCPs would still receive comparable services through a mainstream managed care plan." In fact, most people seeking to enroll in MLTC plans are Dual Eligibles -- meaning that they receive Medicaid and Medicare – who continue to be "excluded" from mainstream managed care plans. Membership in mainstream plans is limited to those Medicaid recipients who *do not* have Medicare. "Mainstream" members who wish to enroll in MLTC plans must already require a nursing home level of care as a condition of MLTC eligibility. See State Department of Health Policy MLTC Policy 14.01: *Transfers from Medicaid Managed Care to Managed Long Term Care* (January 2014).[1]

Given the unavailability of mainstream managed care plans for Dual Eligibles who do not require a nursing home level of care as a condition of MLTC eligibility, we have three concerns. First, responsibility for authorizing services will be left to the Local Departments of Social Services ("LDSS"), which may not have the necessary resources to cover services. Second, the exclusion of low-need individuals in MLTC plans leaves plans with high concentrations of high-need members, who, because of financial pressure on plans, are at risk of being denied the services they need to remain safe in their homes. Third, "spousal impoverishment" protections will not be available to those married individuals carved out of MLTC and required to access services from local districts.

[1] Available at https://www.health.ny.gov/health_care/medicaid/redesign/mltc_policy_14-01.htm.

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These issues are further discussed below.

1. Individuals who may not need a nursing home level of care but who are still eligible for Medicaid personal care or consumer-directed personal assistance services (CDPAS) will not be able to access them at their local Department of Social Services Medicaid program. With the roll out of mandatory MLTC statewide now complete, many local districts have alarmingly reduced resources available in their Medicaid home care programs, with severely insufficient staff to administer the programs and critically insufficient home care contracts to assign aides.[2] Many counties have not yet implemented the new procedures for authorizing "Immediate Need" home care services, which became effective in July 2016, also reportedly for lack of nursing personnel to assess need as well as home care agencies under contract to provide the aide services.[3]

The Governor's proposal should therefore only be adopted if sufficient resources outside of MLTC are available through the counties and New York City to provide services to the people who will newly be excluded from MLTC. Because the already under-resourced local districts would be picking up more and potentially highly complex homecare caseloads under the Governor's proposal, it is essential that resources to serve this new population, as well as existing populations, are provided to the local districts in conjunction with the Governor's proposal.

2. This proposal further carves out the lowest-need MLTC members, leaving only the most disabled and highest-need members in the MLTC plans. Soon after MLTC was made mandatory for Dual Eligibles, the State Department of Health "carved out" those individuals who need only help with "housekeeping" tasks such as laundry, shopping, cleaning and meal preparation, as opposed to help with personal Activities of Daily Living such as bathing and toileting. Those needing only Housekeeping were excluded from MLTC plans and required to receive services from the local county DSS. See MLTC Policy 13.15: *Refining the Definition of CBLTC Services*, available at https://www.health.ny.gov/health_care/medicaid/redesign/mltc_policy_13-15.htm. Now, with the Governor's proposal, more lower need individuals will be excluded from MLTC plans. We are concerned that excluding the lower need people will result in MLTC plans reducing services for their more disabled members, since the low-cost individuals will no longer be in the MLTC plans to balance out the cost of the high-need members. This

[2] LDSSs are still responsible for providing services to (1) Dual Eligibles who need only Level I personal care, a.k.a., housekeeping; (2) Dual Eligibles who need less than 120 days of any type of "long term care service," such as personal care, home health aides, or nursing; (3) certain Medicaid waiver participants; (4) those who are exempt from managed care like people with third party health insurance other than Medicare.

[3] NY Social Services Law was amended April 1, 2015 to require the State Department of Health to establish procedures for local Medicaid agencies to expedite approval of Medicaid and home care services if there is an "immediate need" for home care (personal care or consumer-directed personal assistance services). NY Soc. Serv. L. §366-a(12). See 16ADM-02 - Immediate Need for Personal Care Services and Consumer Directed Personal Assistance Services, available at https://www.health.ny.gov/health_care/medicaid/publications/adm/16adm2.htm.

defeats the principle of capitation and managed care, whereby MLTCs are reimbursed for each person enrolled in their MLTC plans, and which depends on an MLTC's ability to spread the risk of high costs for a few over their many members. Several plans have already withdrawn from the MLTC market, citing inadequate rates. The CEO of Guildnet MLTC plan was quoted as stating that the "calamitous state of reimbursement' made it no longer feasible to operate because the program was incurring 'substantial deficits…'" Politico, Nov. 23, 2016, available at http://www.politico.com/states/new-york/albany/story/2016/11/guildnet-cant-pulling-out-of-some-counties-because-of-calamitous-reimbursement-107541.

3. This proposal would negatively affect married individuals. Married enrollees who are "carved out" of an MLTC plan because of the Governor's proposal will have to spend down their assets and income to below the Federal Poverty Level or will have to admit the ill spouse into a nursing home. Married couples where one spouse is in an MLTC can use the "spousal impoverishment" rules to help protect their assets and income, but only in cases of home care provided through home and community-based services waiver programs[4], which include MLTC plans and the small Nursing Home & Transition and Diversion waiver, but not if the ill spouse gets his or her care through the local DSS. Therefore, as a result of the Governor's proposal, married enrollees will likely be more at risk of nursing home placement because the married couple will have no choice but to either spend-down their assets, depriving the community (well) spouse of his or her much-needed income and assets, or disrupt the family unit by forcing the ill spouse into a nursing home, often prematurely and usually unnecessarily.

The Elder Law and Special Needs Section OPPOSES this proposal to add a nursing home level of care requirement as a condition of eligibility for MLTC. We understand that this new requirement is estimated to deny MLTC enrollment to about five percent (5%) of prospective members. With over 170,000 people enrolled in MLTC plans statewide, this change will affect thousands of people desperately needing home care services.

[4] Section 2404 of the Patient Protection and Affordable Care Act (PPACA) mandates these protections in waivers for five years beginning Jan. 1, 2014.