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Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

Elder #13 February 20, 2018

S. 7507-A, PART B, §5 By: BUDGET
A. 9507-A, PART B, §5 By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES EXCLUDING LONG-TERM NURSING HOME CARE FROM THE MLTC PACKAGE, WHICH WILL INCENTIVIZE PLANS TO PLACE HIGH-NEED MEMBERS IN NURSING HOMES, VIOLATING THE AMERICANS WITH DISABILITIES ACT.

The Executive Budget proposes an amendment to Public Health Law § 4403-f to exclude nursing home care from the Managed Long Term Care (MLTC) package after an MLTC member has resided in the nursing home for a consecutive period of 6 months or more by providing their care through fee-for-service.

While the Governor's stated rationale for this proposal is that this will eliminate duplication of care management services, the real rationale is to address flaws in the rate structure used to design the capitation rates by which the NYS Medicaid program pays the plans. Numerous plans have closed or will close, or cut back on the counties they cover, claiming that the rates are insufficient. Adding nursing home care to the benefit package over the last few years has no doubt exacerbated this problem. Plans have complained that they cannot afford to pay the high nursing home costs, which are higher than the monthly capitation premiums they receive. But removing nursing home care from the MLTC package is not the answer.

Removing the cost of long-term nursing home care from the MLTC plans' responsibility will create an incentive for plans to place members with high needs into nursing homes, rather than approve home care in the amount needed to maintain their health and safety at home, up to 24-hours per day. A relatively small percentage of MLTC members need 12 or more hours of home care each day because of Parkinson's disease, stroke, dementia, multiple sclerosis, or other chronic conditions. The cost of 24-hour home care is more than the cost of nursing home care. Without addressing underlying flaws in the rate structure for MLTC plans, the State is creating incentives for plans to place these high-need members into nursing homes, rather than provide home care in the amount needed. Members of our section already report MLTC

plans routinely denying high-hour care to their high-need clients. The proposed change would only increase the incentives for plans to deny such care. This would potentially violate *Olmstead v. L.C.*, 527 U.S. 581 (1999), in which the United States Supreme Court held that the Americans with Disabilities Act requires states to provide Medicaid services in the "most integrated setting" – in the individual's home rather than an institution.

Instead of removing nursing home care from the MLTC package, the Section urges the Executive to explore other changes in the rate structure that would adequately compensate MLTC Plans for providing high hours of home care where medically necessary. We understand that in conjunction with last year's budget, the Executive committed to exploring separate rate cells or risk adjustments for the nursing home and high cost/high need populations. The State Department of Health has received at least one concrete proposal for a high needs community-based rate cell that shows promise for providing adequate reimbursement to plans to provide home care for those who need the most care. This and other proposals should be tested to determine their viability. Before considering either a nursing home-only rate cell or the proposed removal of nursing home care from the MLTC package, the State should commit to meaningful rate reform that will stabilize the market and maintain New York's longstanding commitment to providing long term services and supports where people want them – in their homes. Funding nursing home care without also funding high-need home care will raise serious concerns of violations of the *Olmstead* decision by the U.S. Supreme Court.

Additionally, more transparency is needed for the taxpayers and consumers to understand how billions of dollars are spent on MLTC services, while in our members' professional experience, MLTC plans resist providing care where needed 12 or more hours per day. Are all plans enrolling their fair share of high-need individuals – who may be quadriplegic, bedbound, or otherwise totally dependent? How much of the rates are paid out for direct care by aides and medical supplies? How much is spent on nursing home care?

The annual MLTC Reports, available at:

https://www.health.ny.gov/health_care/managed_care/mltc/reports.htm, provide some but not enough information. For each plan they show, for example, the average UAS Nursing Home Level of Care (NHLOC) score, the percentage of members who live alone, and member satisfaction with their aide, but no information about how much home care is provided by the plans, in terms of percentage of members receiving different ranges of hours, or, how many members requested increases in care that the plan denied. Such transparency is critical for both consumer choice and public understanding.

Based on the foregoing, the Elder Law and Special Needs Section OPPOSES this legislation.