New York State Bar Association

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Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

Elder #15 February 21, 2018

A. 9507-A, PART B - §3 By: BUDGET
S. 7507-A, PART B - §3 By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE PROPOSAL TO REQUIRE A UAS SCORE OF 9 AS A CONDITION OF MANAGED LONG TERM CARE ELIGIBILITY

Part B, Section 3, of the Health and Mental Health budget bill would amend Public Health Law to add a requirement that an individual receive a score of 9 on the Uniform Assessment System assessment tool, out of a possible score of 48 (with zero representing the highest level of functioning) in order to participate in a Managed Long Term Care ("MLTC") program. Cost savings on this proposal were based upon the fact that the current capitated rate for these individuals is based on a higher level of utilization than these individuals presently require. While some savings may be realized initially from the proposal, the resultant effect would be to increase the capitated rates paid to MLTC plans and also to potentially increase nursing home utilization, at a higher cost, if higher need individuals are forced out of the MLTC system as proposed in Section 5 of the this bill.

The Uniform Assessment System is used to assess the level of medical need, the Department of Health, in its 2016 Managed Long Term Care Report, summarized the scoring system as follows:

> The NYSDOH developed a functional assessment scoring system, the Nursing Facility Level of Care (NFLOC) score, based on the UAS-NY assessment instrument. The NFLOC score is comprised of 11 components that are derived from 22 items from the UAS-NY instrument. The items include the areas of incontinence, cognitive performance, Activities of Daily Living (ADLs), and behavior. Points are allocated to the different levels of functioning with the number of points increasing as the functional deficits increase. The maximum number of points is 48. A Level of Care Score of five or more indicates need of services usually provided in a nursing home.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

> The current statewide average UAS-NY NFLOC score is 18.9. Some measures in this report are based on the NFLOC score and its components allowing for a comparison of case mix among the plans. (at page 8.)

As stated in the report, the current standard for nursing home level of care is a score of five or more. Although there is currently no stated minimum UAS score to qualify for MLTC, many current recipients are able to enroll with a score of five or more. Based on this, a number of individuals would be affected by this proposal; however, we must ensure that they are not neglected by the health care system. While we do believe that removing the constraints of a managed care system provides more flexibility and freedom of choice for these individuals; our concern arises from the difficulty in obtaining services on a fee-for-service basis in many regions of New York. Also, since a significant portion of these recipients are Dual Eligibles, they will not be able to get their home care services through mainstream managed care plans. As in the past, responsibility for authorizing services will be delegated to the Local Departments of Social Services ("LDSS"), which may not have the necessary resources to effectuate services in a timely manner. Second, under this proposal, only the most disabled and highest-need members will remain in the MLTC plan and these individuals will receive cuts in services as MLTCs maximize resources within their capitated rate. The result will be that the more medically needy will be forced into nursing homes. Finally, given the executive's proposal to eliminate spousal refusal for any applicants other than those in nursing homes or in MLTC programs, a large group of married applicants will be excluded from receiving care altogether.

Our first concern is that 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. LDSS are still responsible for providing services to (1) Dual Eligibles who need only Level I personal care, a.k.a., housekeeping; and (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. In addition, many LDSS have not yet implemented the 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.

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 home care 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.

Second, under this proposal, only the most disabled and highest-need members will remain in the MLTC plan and these will receive cuts in services as MLTCs maximize resources within their capitated rate, forcing the most medically needy into nursing homes. Although capitated rates may rise as the lower need individuals are carved out, with only the most medically needy individuals remaining in the plans, it is expected that those individuals would face cuts in services and would have greater difficulty in receiving an appropriate level of care. Because the current rate structure spreads the cost over a a larger population, high cost utilizers are balanced out by the individuals with lower needs. Without the lower cost individuals to keep rates at lower levels, MLTCs would be pressed to reduce services to higher need individuals in an effort to remain solvent. We have already seen a number of plans in past couple of years that have withdrawn from the market or reduced their coverage areas, making access to care that much more difficult for people in need of home care. Moreover, with the Executive's proposal in Section 5 of Part B of the Health and Mental Health budget bill to remove nursing home care from MLTC plans would force higher need individuals who are unable to get a adequate level of home care services from a plan would be forced into a nursing home.

Third, the proposal to eliminate the option of "spousal refusal" for fee for service home care would create a barrier to receiving any care for married applicants. Section 6 of Part B of the Health and Mental Health budget bill would limit the use of spousal refusal to the institutional and MLTC programs only. Since the population being "carved out" of MLTC would now not be entitled to spousal impoverishment budgeting or spousal refusal, they would only qualify under Community Medicaid eligibility standards, which require that couples can have resources no greater than $22,200 and available income no greater than $1,233 per month, which is all that a couple can retain to cover their monthly food, clothing, real estate taxes, utilities, rent, transportation and other living expenses. These limits are completely unrealistic for living expenses throughout most of New York State today.

The Elder Law and Special Needs Section OPPOSES this proposal to require a UAS score of 9 as a condition of eligibility for MLTC.