

Memorandum in Support

January 31, 2024

S. 7800
A. 8470

By: Senator Rivera
By: M. of A. Paulin

Senate Committee: Health
Assembly Committee: Health
Effective Date: Sections 1, 3, 4 Immediately;
Remaining Sections April 1, 2026

AN ACT to amend the public health law, the social services law, the elder law and the mental hygiene law, in relation to long term care options; and to repeal certain provisions of the public health law relating to managed long term care

LAW AND SECTIONS REFERRED TO: Section 4403-f of the Public Health Law

The NYSBA Elder Law & Special Needs Section (“ELSN”) supports S7800/A8470 to replace the Managed Long Term Care (MLTC) model with a managed fee-for-service program that works for consumers and home care workers alike, and will save New York State millions of dollars.¹ Since enrollment in MLTC plans became mandatory in 2012 for adults with Medicaid who need home care to remain safe in their homes, members of our section have represented thousands of older New Yorkers and younger people with disabilities who must fight these MLTC plans to win sufficient hours of home care. The MLTC plans routinely deny their members enough hours of Medicaid home care services needed to remain safe in their homes. Consumers who, because of dementia, Parkinson’s Disease, stroke, and a host of other infirmities, need higher hours of care must accept the minimal hours offered by these plans in order to enroll, then fight for more hours in multiple appeals.

The Insurance model has been proven not to work for long-term care services. It is time for New York to acknowledge that this experiment of paying insurance companies to provide ONLY long-term care services cannot work. In general health insurance, most of the insured population is healthy and needs preventive care and minimal services, balancing out the few who will need expensive care. With MLTC, however, all 280,000 members, by definition, have chronic conditions for which they have been determined to need costly home care services.

¹ Data from NYS Managed Care Cost & Operating Reports (MMCOR) filed by MLTC plans for 2018, using statewide reports. Data is visualized interactively at <https://nylag.org/mmc-cor-consolidated-finance-table/>, allowing user to select data by year, geographic region, or by specific types of expenditures or income. This is one of the interactive visualizations in the NYLAG MLTC Data Transparency Project, available at <https://nylag.org/MLTCdatatransparency/>. Complete project report available at <https://nylag.org/wp-content/uploads/2022/09/MMCOR-Report-FINAL.3.pdf>.

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.

Plus, the plans are relatively small and cannot – or will not – absorb the cost of the few who need high hours of care such as 24/7 home care. So, they make a profit by DENYING needed home care services and DELAYING approvals for months – forcing frail seniors and people with disabilities through endless appeals. Historically, only a small percentage of the home care population need the highest amount of home care – 24 hours/day. However, MLTC plans are incentivized to deny 24/7 care, only authorizing it if they lose an appeal. Most consumers lack access to a legal representative and lack the wherewithal to appeal at all or lose their appeals when up against an insurance company lawyer. Those who can navigate the system win, especially with an experienced advocate.²

The insurance companies also game the system by marketing to enroll new members who have minimal needs, enhancing profits since NYS pays the plans the same “per member per month” premium for every member. This marketing has led to skyrocketing enrollment.

The MLTC plans also game the system by refusing to reinstate or increase home care as needed when a member is temporarily placed into a rehab facility. We have represented hundreds of seniors who desperately want to return home. Without our aggressive advocacy, they would be forced to remain permanently in a nursing home. This defeats federal and state goals of “rebalancing” long-term care from institutional to community-based care – and violates our clients’ rights under the Americans with Disabilities Act (ADA) as interpreted by the U.S. Supreme Court in *Olmstead v. L.C.*

There is a lack of accountability and transparency in MLTC Plans. A managed care system requires scrupulous oversight of insurance companies, which this administration has been unwilling or unable to do. In 2022, the NYS Comptroller found that NYS paid \$2.8 billion in premiums to MLTC plans that provided little or no services, and another \$701 million for consumers who had died, moved to Assisted Living, or were otherwise not eligible for MLTC.³ The Comptroller found that the “Department does not perform reviews to identify instances where MLTC members remain in MLTC but receive few services during their enrollment period.” *Id.*

² A study of Fair Hearing decisions in NYS found that over 90% of all MLTC decisions to reduce hours of home care were reversed in a Fair Hearing. See *Mis-Managed Care: Fair Hearing Decisions on Medicaid Home Care Reductions by Managed Long Term Care Plans, June-December 2015*, by Medicaid Matters NY and NYS Chapter of National Academy of Elder Law Attorneys (July 2016), available at <https://medicaidmattersny.org/mltc-report/>. The report was featured in a story in the New York Times, Nina Bernstein, *Lives Upended by Disputed Cuts in HomeHealth Care for Disabled Patients*, July 21, 2016, available at https://www.nytimes.com/2016/07/21/nyregion/insurance-groups-in-new-york-improperly-cut-home-care-hours.html?_r=0.

³ New York State Comptroller, *Medicaid Program — Oversight of Managed Long-Term Care Member Eligibility*, Aug. 5, 2022, available at <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2022-20s52.pdf>.

In response, consumer advocates called on DOH to adopt long term care access standards recommended by CMS, and to post a public quality dashboard with performance metrics such as the maximum wait time for home care services to be initiated after authorization.⁴ Yet the Commissioner of Health failed to adopt any accountability measures to address the Comptroller's concerns, and Gov. Hochul recently vetoed a bill that would have required some transparency about home care usage, A1926/S1683.

The proposed bill replaces MLTC with a managed fee for service model. As shown to work in Connecticut, Washington State, and Alabama, a care management entity would be paid for the job of developing a care plan and authorizing services. This model is truly conflict-free, unlike the MLTC model in which the MLTC plan has a conflict of interest with its own members that leads it to deny crucial services. Providers would bill Medicaid for services on a fee-for-service basis. Medicaid would pay for the services provided instead of an inflated premium to an insurance plan that is much higher than the few services actually provided. Our clients will be able to get the home care services they desperately need. Managed Fee for Service will also promote accountability and transparency. Providers will bill the state Medicaid program instead of MLTC plans, so rates will be transparent and calculated to cover increases in the minimum wage.

For the above reasons, the New York State Bar Association Elder Law and Special Needs Section SUPPORTS this legislation.

⁴ Consumer Advocate Statement on New York State Comptroller Report of Aug. 5, 2022: Medicaid Program – Oversight of Managed Long Term Care Member Eligibility (Nov. 2022, available at <https://medicaidmattersny.org/wp-content/uploads/2022/11/OSC-MLTC-report-consumer-advocates-statement-11.2.22-final.pdf>, citing CMS, Promoting Access in Medicaid and CHIP Managed Care: Managed Long Term Services and Supports Access Monitoring Toolkit, June 2022, available at <https://www.medicaid.gov/medicaid/managed-care/downloads/mltss-access-toolkit.pdf>)