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August 12, 2026

The Honorable Kathy Hochul,
Governor of New York State
Executive Chamber, State Capitol
Albany, New York 12224

RE: Support for A11569 (De los Santos)/ S9573 (Rivera) – Mandate Waiting List for Nursing Home Transition & Diversion Waiver

Dear Governor Hochul:

The Elder Law and Special Needs Section of the New York State Bar Association (NYSBA) respectfully urges you to approve A11569 (De los Santos) / S9573 (Rivera). With enrollment in the Nursing Home Transition and Diversion (NHTD) Waiver now capped, the absence of a uniform waiting-list process threatens to produce inconsistent and inequitable results across the State. This legislation would address that immediate problem by requiring transparent regional waiting lists, ensuring that available waiver opportunities are allocated fairly while preserving pathways for nursing home residents and other eligible New Yorkers to live in their communities.

The Elder Law and Special Needs Section (ELSN) of the NYSBA has a membership of 3,158 attorneys who practice in every county of the state in the broad field of elder law, which spans counseling and preparing for incapacity and death through advance directives to assisting older New Yorkers to qualify for and navigate the complex Medicaid program in order to obtain vital home care services they need to remain in their homes because of disability.

We your recent affirmation of New York's commitment to carrying out the promise of the Americans with Disabilities Act (ADA) as

interpreted in the Supreme Court's Olmstead v. L.C. decision. [1] Firmly responding to the U.S. Dept. of Justice's recent attack on the ADA,[2] you stated,

> Olmstead v L.C. is one of the most significant civil rights decisions for people with disabilities in our nation's history. The promise of Olmstead is clear: people with disabilities deserve to live, work, and participate fully in their communities. In New York, we understand what is at stake and will continue to fiercely prioritize access to services that enable people to live with dignity and autonomy in the community. (See n. 5.)

Our state's commitment to enabling individuals to leave nursing homes and return to the community is a paramount goal of the Nursing Home Transition and Diversion (NHTD) waiver. The state Department of Health (DOH) recently won approval from the federal Medicaid agency, CMS, to cap enrollment in this waiver. The cap was just increased to 14,079 [3] – but we understand this cap has already been reached. Hence, a waiting list is essential to ensure that slots that become available are allocated in a fair, equitable way. This bill A11569/ S9573 simply requires the State to establish a waiting list on a regional basis to ensure an equitable process. State DOH has already indicated on its website that its "Regional Resource Development Centers [RRDC] *will process referrals for available spaces on a first-come, first-serve basis*. [4] (emphasis added).

Approval of A11569/S9573 would advance several important State objectives. It would provide a clear and administrable process for allocating limited waiver openings, prevent regional inconsistencies and arbitrary outcomes, protect individuals who are at risk of unnecessary institutionalization, and further New York's commitment to the integration mandate of the Americans with Disabilities Act and Olmstead v. L.C. The bill does not expand the existing enrollment cap or create a new entitlement; it ensures that, while enrollment remains limited, available openings are distributed through a fair, transparent, and regionally balanced process.

If no waiting list is kept, it is impossible to process referrals on a first-come first-serve basis. Yet the State's waiver amendment submitted to CMS does not indicate that it will keep a waiting

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[1] Statement of Governor Kathy Hochul, quoted in Emyle Watkins, *Hochul Breaks Silence on DOJ Olmstead Memo: "We Understand What Is at Stake,"* WXXI News (June 25, 2026), https://www.wxxinews.org/2026-06-25/hochul-breaks-silence-on-doj-olmstead-memo-we-understand-what-is-at-stake.

[2] See U.S. Dep't of Just., Off. of Legal Couns., *Application of the Rehabilitation Act and Americans with Disabilities Act to State Institutionalization of Patients with Severe Mental Illness or Disabilities*, 50 Op. O.L.C. ___ (June 18, 2026), https://www.justice.gov/olc/media/1446701/dl

[3] See U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., *Application for a § 1915(c) Home and Community-Based Services Waiver: New York Nursing Home Transition and Diversion Waiver, Waiver No. 0444*, at 36 (approved May 15, 2026), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/NY0444.zip (last document in ZIP file).

[4] See N.Y. State Dep't of Health, *The Nursing Home Transition and Diversion (NHTD) Medicaid Waiver Program* (rev. May 2026), https://www.health.ny.gov/facilities/long_term_care/nhtd/

list.[5] Each RRDC is already now making up its own rules on how to handle referrals during the enrollment freeze, and on which applications to process once the front door opens for any region. This will inevitably result in an inequitable process with no transparency.

Equitable access to the NHTD waiver is essential. The NHTD Waiver provides individualized supports to people who are determined to need a "nursing home level of care," and need services either to return to the community from a nursing home or to prevent the need for institutionalization. With its array of "waiver" services not available in traditional MLTC or managed care, the NHTD waiver is uniquely positioned to enable people to return to the community. For example, the Home and Community Support Service (HCSS), a "waiver" service, is specifically designed to provide "oversight and/or supervision as a discrete service" along with assistance with Activities of Daily Living (ADLs) and Instrumental ADLs (IADLS).[6] The HCSS service is often needed by people with Alzheimer's disease or other dementia, as well as those with other cognitive, mental or other impairments for which cueing and supervision is needed. Also, the Housing subsidy is uniquely available to NHTD waiver participants and is essential for many people to return home from a nursing home.

This bill requires DOH "to establish a waiting list per designated waiver region," referring to the 11 regions served by eight RRDCs.[7] The bill requires only what DOH has promised it will do on its website – to process referrals on a first-come first-serve basis. The bill sensibly requires the waiting lists to be maintained by region, and for openings in any region to be filled by "eligible persons who have been on the waiting list in the order in which they came on in each region." Maintaining regional wait lists with transparent, equitable protocol is the only way to ensure equitable access through a regionally balanced process that distributes available waiver opportunities fairly across New York State.

NYSBA ELSN strongly supports the bill language that authorizes DOH "to prioritize certain populations, including but not limited to eligible persons transitioning from nursing facilities. Setting priorities of the most at-risk groups is permitted in a 1915(c) waiver.[8]If this bill becomes law, NYSBA ELSN will urge DOH to prioritize eligible persons who are transitioning from nursing facilities, along with other groups who are at most at risk if denied enrollment. New York is second only to California in the number of residents in nursing homes,[9] showing we

[5] See supra note 3, app. B-3-c, at 37.
[6] See N.Y. State Dep't of Health, *Nursing Home Transition and Diversion Medicaid Waiver Program Manual*, https://www.health.ny.gov/facilities/long_term_care/nhtd/manual.htm (last visited Aug. 4, 2026)
[7] See N.Y. State Dep't of Health, *Nursing Home Transition and Diversion (NHTD) Waiver: Regional Resource Development Center (RRDC) List* (rev. May 2026), https://www.health.ny.gov/facilities/long_term_care/regional_resource_development_centers.htm
[8] See supra note 3, app. B-3-c, at 37.
[9] See KFF, *Total Number of Residents in Certified Nursing Facilities*, State Health Facts (2025), https://www.kff.org/other-health/state-indicator/number-of-nursing-facility-residents/ (last visited Aug. 4, 2026).

have a long road ahead to realize the promise of Olmstead. Priority access to the NHTD waiver for people trying to leave a nursing home is a crucial means to achieve the goals of Olmstead.

In a waiting list protocol, NYSBA ELSN will urge DOH to prioritize other vulnerable populations including children who age out of the Children's waiver and people who are denied personal care, CDPAP, or MLTC enrollment under the new minimum needs ADL thresholds that began Sept. 1, 2025. Those who live in the community and are determined to have a Nursing Home Level of Care are entitled to services under the Community First Choice Option (CFCO) – but if they fail the ADL test, they are denied any services.[10]

Also, the state must do better enforcement to require MLTC plans to provide needed home care rather than refer people who need high hours of care, such as 24-hour care, to NHTD. Our section members represent countless older or disabled New Yorkers whose clients are routinely denied needed home care from MLTC plans, which refer them to NHTD. These referrals from MLTC plans to NHTD are the reason for the rapidly increased enrollment and costs in the NHTD program. If MLTC plans are prohibited from offloading their expensive members to NHTD, this will ensure that the few NHTD slots are reserved for those with no other options.

A11569/S9573 offers a practical and balanced response to the consequences of the NHTD enrollment cap. By requiring regional waiting lists and an orderly process for filling available openings, the bill would promote fairness and transparency, protect vulnerable New Yorkers from avoidable institutionalization, and help preserve meaningful access to home- and community-based services. It would also provide DOH with the flexibility to prioritize individuals transitioning from nursing facilities and other populations facing the greatest risk of harm.

For these reasons, the Elder Law and Special Needs Section respectfully urges you to approve A11569/S9573. Signing this legislation would reinforce New York's commitment to disability rights, community integration, and the fair administration of essential Medicaid waiver services.

Thank you for your thoughtful consideration and your continued commitment to older adults and New Yorkers with disabilities.

If you have questions or need any additional information, please contact NYSBA's Director of Government Relations, Matthew Pennello, at mpennello@nysba.org or via telephone at (518) 487-5748.

[10] See N.Y. State Dep't of Health, *Community First Choice Option (CFCO)* (rev. Nov. 2022), https://www.health.ny.gov/health_care/medicaid/redesign/community_first_choice_option.htm

Respectfully,

s/ Tammy Lawlor,

Chair of the Elder Law and Special Needs Section

Cc: Brian M. Mahanna, Esq., Counsel to the Governor
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