

July 2, 2020

The Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

RE: Request to Suspend -- Until After Pandemic -- Mass MLTC Disenrollments that Threaten Health and Safety of Nursing Home Residents, Particularly People of Color

Dear Governor Cuomo:

We write as members of Medicaid Matters NY (MMNY) and as consumer advocates who advocate for the rights of people who rely on Medicaid for long-term care services because of their disabilities. We write to request that you halt, until after the public health emergency ends, implementation of a massive change in the Managed Long Term Care (MLTC) program that CMS approved in December, but which the State Department of Health (DOH) appropriately paused at the beginning of the COVID-19 emergency. Beginning July 10<sup>th</sup>, DOH will send notices to nearly 20,000 MLTC members who have been in nursing homes for three or more months that they will be disenrolled from their MLTC plans because they are considered “long term nursing home stay residents” (LTNHS). Many of these people have been receiving home care through their MLTC plans, then were hospitalized, admitted to the nursing home, and fully expect to return home. Even before COVID-19 they have faced obstacles in being discharged. The pandemic has severely exacerbated these barriers. If they are now disenrolled from their MLTC plans because of this change, it will be even more difficult for them to return home, exposing more vulnerable New Yorkers to the Coronavirus.

Now is not the time to drastically change a program that promotes community-based care as an alternative to nursing homes, when nursing home residents have already been so devastated by this virus. Twenty-five percent of all deaths in the state due to COVID-19 have been in nursing homes, which is likely an undercount as it omits those nursing home residents who died after being transferred to hospitals.<sup>1</sup>

Moreover, moving forward with this initiative is likely to exacerbate the disproportionate impact of COVID-19 on people of color. The devastating racial disparities in COVID-19’s impact have been particularly stark for those in nursing homes. Nursing homes in New York that have reported patient deaths from COVID-

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<sup>1</sup> Percentage derived from dividing 24,866 fatalities by 6,277 fatalities in nursing homes confirmed or presumed to be caused by COVID-19, available at <https://tinyurl.com/covid19trackerNY> (accessed 7/1/20) and [https://www.health.ny.gov/statistics/diseases/covid-19/fatalities\\_nursing\\_home\\_acf.pdf](https://www.health.ny.gov/statistics/diseases/covid-19/fatalities_nursing_home_acf.pdf)

19 are far more likely to serve people of color.<sup>2</sup> In fact, race was found to correlate more with the death rate than occupancy rates, staffing ratios, quality scores, percentage of residents on Medicaid, or other factors.<sup>3</sup> **New York State had the largest disparity of 17 states studied between incidence of COVID-19 in nursing homes that are at least 25% black and Latino (84% of these homes)** compared to facilities with fewer than 25% black and Latino residents (52%).<sup>4</sup> As our state and our nation grapples with the horrors that COVID-19 has wrought on people of color, this is not the time for New York to implement an initiative that threatens to worsen these disparities. Repairing the impact that systemic racism has had on our health care system, in New York and throughout the United States, is a herculean task that requires long-term commitment of resources. In the meantime, our state can at a minimum avoid taking steps to exacerbate disparities in the near term.

Last week, we wrote to the DOH administrators of this initiative to express our grave concerns about going forward with this now (letter attached). While we appreciate our partnership with DOH, with which we have worked constructively to improve the launch of this initiative prior to the epidemic, we have received no response beyond an acknowledgement of receipt of our letter. As the notices will be sent out beginning July 10<sup>th</sup> to nearly 20,000 vulnerable seniors and people with disabilities, we ask for your urgent attention.

Our letter to DOH highlights various ways in which this initiative will be dangerous to New Yorkers with disabilities, in particular people of color:

- Families, Open Doors, and other advocates are still banned from visiting nursing home residents, so they cannot help these individuals respond to the notices to express their desire to return home, which is necessary to halt the disenrollment. The Long-Term Care Ombudsprogram staff and volunteers are working with residents and family members remotely to address concerns about care, threatened evictions, and more, since they can't be inside the facilities due to the high risk of exposure and lack of PPE or testing. But the program is constrained by a very severe lack of State funding, and nursing facilities do not always inform residents about it or provide the program with copies of adverse notices on a timely basis, if at all.
- DOH has not committed to sending copies of the notice to family members or even to the residents' home address, if any – so the resident is on their own.

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<sup>2</sup> *The Striking Racial Divide in How Covid-19 Has Hit Nursing Homes*, New York Times, May 21, 2020, available at <https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html>; Joseph Shapiro et al., *In New York Nursing Homes, Death Comes To Facilities With More People Of Color*, National Public Radio, April 22, 2020, available at <https://www.npr.org/2020/04/22/841463120/in-new-york-nursing-homes-death-comes-to-facilities-with-more-people-of-color>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

- Staff in nursing homes are overwhelmed by demands of COVID-19 and cannot be counted on to help residents make the necessary phone calls to express their desire to return home and to halt the disenrollment.
- Mail delivery is slower because of the pandemic, so the notices mailed during the week of July 10<sup>th</sup> may not even be delivered with time for the resident to respond before August 1<sup>st</sup>, even aside from the issues listed above.
- While MLTC plans and nursing homes were asked to identify individuals with active discharge plans, who will not receive the letters, the list is too limited. Thousands of residents who do want to return home will receive the letters and will be required to respond to them quickly, though they are isolated from and without the support of their families and other supports.

As an alternative, we would propose that people who were admitted to the nursing within the last 18 months be carved out from receiving the notices, so that the notices will go to the truly long-term stay residents who may be less likely to expect to return home. We would welcome the opportunity to discuss any way to mitigate the harm of implementing this now.

In conclusion, we ask the state to delay sending these notices until after the public emergency has been declared over, at least for those who have been in the nursing home for less than 18 months. As we proposed to DOH, if the notices do go out in July, the effective date of disenrollment should be changed to September 1<sup>st</sup> instead of August 1<sup>st</sup> to afford extra time for mail delivery and time for members to get help to assert their right to appeal and/or request an assessment. Also, duplicate notices must be sent to the members' home addresses, if any, and to their designated representatives known to the nursing home and plan.

Thank you for your cooperation.

Very truly yours,



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On behalf of these organizations:

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Cardozo Bet Tzedek Legal Services, by Rebekah Diller and Leslie Salzman  
Center for Elder Law & Justice, Buffalo NY  
Center for Independence of the Disabled, NY  
Disability Rights New York  
Empire Justice Center  
Long Term Care Community Coalition  
Medicaid Matters New York  
Mobilization for Justice, Inc.  
Neighbors to Save Rivington House  
New York Legal Assistance Group  
People Organized for Our Rights (POOR)  
The Legal Aid Society

Cc: Paul Francis, Deputy Secretary for Health & Human Services  
Megan Baldwin, Assistant Secretary for Health  
Robert Mujica, Director, New York State Division of the Budget  
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Donna Frescatore, Medicaid Director, Deputy Commissioner  
Lisa Sbrana, Director, Div. of Eligibility and Marketplace Integration  
Lana Earle, Director, Division of Long Term Care  
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Encl. Letter to DOH June 29, 2020

by e-mail

June 29, 2020

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RE: Nursing Home LTNHS MLTC Disenrollments

Dear DOH Colleagues:

We write as members of Medicaid Matters NY (MMNY) and as consumer advocates who met with you earlier this year to discuss implementation of the disenrollment of long-term nursing home stay (LTNHS) members from MLTC plans, as approved by CMS in late December 2019. We appreciate DOH's revision of the disenrollment notice in response to concerns we raised in our letter of February 10, 2020 and in our subsequent calls. Soon after our last meeting on March 3, 2020, of course, the pandemic shut-down began and DOH conveyed informally that the disenrollments would be postponed. At the time, there were outstanding issues we had raised. Since the pandemic is ongoing, we were shocked to learn that DOH is proceeding with sending out the disenrollment notices in mid-July effective August 1, 2020. We have grave concerns about proceeding with this initiative at this time, including outstanding issues from our previous meetings.

Nationwide attention has been focused on nursing homes because of the high rate of COVID-19 infection and mortality. If disenrollment from an MLTC plan will make it more difficult for any New Yorkers to return home from a nursing home – which is inevitable – it is simply not the time to implement this change affecting over 20,000 vulnerable individuals.

- 1. We repeat our requests previously raised that duplicate notices must be sent to the consumer's home address and to designated representatives/family members.**

For the reasons explained above, this change applies to the population that is the worst situated to be able to act on its appeal rights in a timely manner. Accordingly, our letter of Feb. 10, 2020 stated,

NYMC should send the disenrollment notices to the consumer both at the nursing home and their home in the community, and to their designated representative known to the nursing home or MLTC plan. Notices solely sent to the consumer at the nursing home may not be seen in time by an involved family member who may visit only weekly, or they may get lost. Sending the

notice to the member's address in the community, if any, and to their designated representative makes receipt more likely.<sup>1</sup> The MLTC plans also should have an involved family member on record who should receive the notice.

Of course the prospect of any visits by involved family members to their loved ones in nursing homes, as mentioned in our February 2020 letter, is now a distant memory, making the concerns raised then even more urgent. When we raised this issue in our call with you on February 21st, Lana stated that she would look into it and work with Maximus on it. When we raised it again at the Medicaid Matters NY meeting last week, Lana did not have specific information on this, suggesting that whatever information Maximus had on file would be used.

*The disenrollment notices should not be mailed without duplicate mailings to the consumer's home, if any, and to the family members or other individuals who are known to the MLTC plans and nursing homes as their contacts and representatives. As to what information Maximus is likely to have, it seems it should at least have the consumer's home address, if any. We ask for confirmation that the disenrollment notices will be sent both to the home address and to the nursing home. However, we strongly doubt that Maximus has the mailing addresses for family members or other individuals who have been designated as the consumer's representative with the MLTC plan or with the nursing home. These addresses could only be obtained from the plans and the nursing homes. DOH communications with the nursing homes that we have seen did not request this information from the nursing homes; rather, the nursing homes were asked only to identify the names and Medicaid numbers of residents classified as LTNHS, and the name of their MLTC plans.*

## **2. Ongoing Ban on Family, Long Term Care Ombudsman program, Open Doors, MHLS, and Other Visitors to Nursing Homes will Impede Members' Ability to Request Fair Hearings or an Assessment**

The impact of the visitor ban on the ability of nursing home residents to exercise the appeal rights in the disenrollment notice, and to contact NYMC for an assessment, is obvious. In addition to families, Open Doors, the Long Term Care Ombudsprogram staff and volunteers, and Mental Hygiene Legal Services are also shut out of nursing homes, or lack PPE to safely enter to visit residents and investigate problems. Even apart from COVID, the [chronic underfunding](#) of the Long Term Care Ombudsprogram renders it unable to offer substantial assistance to residents receiving these notices. Mental Hygiene Legal Services (MHLS), authorized by statute in 2019 to provide legal services for nursing home residents with serious mental illness, has been unable to do so because of the shutdown.<sup>2</sup> Stressed nursing home staff overwhelmed by the demands of COVID lack the time to assist residents with responding to the notices.

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<sup>1</sup> 10 NYCRR § 415.2(f)(definition of "designated representative").

<sup>2</sup> Mental Hygiene Law §47.01, Subd. (a), as amended by L. 2019, Ch. 658.

Without assistance, most residents lack the ability to take the steps required to halt the disenrollment if they want to return home. For example, a NYLAG client was recently discharged home from a facility after a four-month battle with the MLTC plan to approve increased home care hours. Even through her dementia, this consumer expressed a longing to return home. Only with assistance would she have been able to read, understand, and act upon her rights as explained in the notice including requesting a fair hearing or contacting NYMC for an assessment. As stated above, it does not appear that DOH would have sent her daughter, designated as her representative both with the MLTC plan and the nursing home, a duplicate notice.

Additionally, many nursing home residents do not have phones, whether cell phones or a landline. Even those who have the mental and physical ability to make a call to request a fair hearing or assessment will not be able to do so, and with no family or friends able to visit cannot enlist their help. Again, nursing home staff are burdened with COVID responsibilities so cannot be depended on to help.

**3. Mail Delivery by US Postal Service has been severely delayed in the pandemic – at a minimum notices sent in July should have an effective date of September 1st rather than August 1st.**

As many of us have personally experienced, and has been [reported in the press](#), the pandemic is causing delays in mail delivery. Lana announced at the MMNY meeting last week that the notices would be sent out in batches beginning July 10th. This means many would be sent out the week of July 13th. The last day to request a fair hearing or an assessment from New York Medicaid Choice (NYMC) would be July 31st. Given the mail delays – and then inevitable distribution delays within nursing homes because of the stresses on nursing home staff during the pandemic, including enhanced infection containment and heightened testing requirements – many consumers will receive the notices AFTER the effective date or without enough time to respond or to get help to understand the content and respond. Nursing home staff currently have no incentive – or staff resources – to assist residents eager to return home with any part of this process. Even apart from the pandemic, it is common for mail not to be distributed to nursing home residents, but to be simply placed in their file; we know this from experience with Medicaid eligibility notices.

As described above, family, long term care ombuds staff, and other visitors are still banned, so are unable to help residents respond to the notice at all, let alone in the short window period – if any – for responding before August 1<sup>st</sup>.

**4. DOH has Defined Too Restrictively Which Members Have an “Active Discharge Plan.”**

The Dear Administrator Letter (DAL) dated June 11, 2020, like the one it replaced dated Jan. 21, 2020<sup>3</sup> to nursing home administrators is unduly restrictive on defining

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<sup>3</sup> Neither of these DAL directives are posted on the DOH [webpage for Nursing Home DALs](#). We learned of the June 11, 2020 DAL letter only through a nursing home representative. Nor has any guidance at all been posted on the [MRT 90 webpage](#) where other MLTC guidance is posted, or any information at all for consumers other than the informational letter sent in January. The lack of publicly available guidance describing the policies and procedures for such a large initiative is disturbing.



who will NOT receive the notice because they have an "active discharge plan." The DAL gave the nursing homes from June 11th to June 16th – a 5-day period that includes a weekend -- to identify members (1) actively being assessed by the Open Doors program, or (2) those with an active transition plan in place with "all the required elements" – though those elements are not defined, or (3) those with an expected discharge date of 3 months or less, a discharge plan in place that could not be improved by being referred to Open Doors. Only those three categories of MLTC enrollees currently in nursing homes will not receive disenrollment notices.

Even if nursing homes could identify these members in such a short time, which is extremely unlikely, given the testing and other demands placed on nursing homes in the ongoing COVID-19 crisis, this definition leaves out many people who prefer to be and could safely be discharged with MLTC services. We recognize that the revised disenrollment notice now states that the recipients have an opportunity to request an assessment as to whether they can be safely discharged home. However, as stated above, residents are cut off from their families and other supports who would normally help them assert these rights. This makes it all the more imperative that the plans and nursing homes identify a sufficiently inclusive universe of members who have a preference to return to the community. Yet instead of casting a wide net, the DAL asks nursing homes to identify only those far along in the discharge planning process, with an active discharge plan.

The notice has this language placing the burden on the consumer to self-identify has having a request or appeal pending:

What do I do if I have a pending request or appeal to reinstate or increase my home care?

If you call New York Medicaid Choice at 1-888-401-6582 (TTY: 1-888-329-1541) and tell them you are waiting for a decision from your plan or a fair hearing decision about home care services, and we confirm this with your plan, you will remain enrolled in your plan until you receive a decision and any appeal is completed.

This language would be helpful if the plans had also been asked to identify members for whom a request for prior approval or concurrent review, or an appeal or fair hearing, is pending. This might help capture a member who slipped through the cracks and was not identified by the plan. However, the plans *were not even asked* to identify these members who do not have a final discharge plan. DOH has placed an unfair burden on people in nursing homes – cut off from their families and possibly sick with COVID or recovering from other acute episodes – to self-identify as having a pending request or appeal with their plan, in order to remain in their plan in order to return home.

By relying on plans and nursing homes to identify those individuals with active discharge plans only, DOH also ignores the adversarial relationship that can exist between members and the plans. In the case mentioned above, where NYLAG's client returned home from a nursing home last week after months of advocacy, the plan not only had denied an increase in home care hours but had sent an adverse determination to discontinue home care altogether based on its view that the



member could only be safely cared for in a nursing home. The plan would never have identified this member as having an active discharge plan.

In another case NYLAG recently advised on, an MLTC member was admitted for rehabilitation in February after having been hospitalized after a fall and then contracted Covid-19. In April her daughter advocated for the plan to reassess her for increased hours to return home. On May 1st the plan sent an IAD stating it would not reassess until she was ready to be discharged, which she was, then on May 12th sent an FAD to the same effect, even though the nursing home had agreed she could be discharged with increased home care. A fair hearing was held last week – even though the sole issue was whether the plan needed to reassess her for possible discharge home. The plan, clearly delaying reassessment, would not identify this member as having an active discharge plan. The member – who is Spanish-speaking, unable to read the notice, and cut off from her daughter who cannot visit – would be unable to read and understand the notice sent in English and make the required call to NYMC. This is simply too burdensome for consumers in this pandemic.

#### **5. MLTC Members Who Re-Enroll after Oct. 1, 2020 after Being Disenrolled for LTNHS Must be Deemed to have Been Continuously in the MLTC Plan For Purposes of the New ADL Restrictions on Eligibility**

The recently enacted state budget restricts eligibility for MLTC enrollment, as well as eligibility for receipt of personal care and CDPAP services, to individuals who meet a new minimum ADL requirement. Public Health Law §4403-f subd. 7 (b)(v)(14). The law grandfathers in current enrollees by stating, “This provision shall not apply to a person who has been continuously enrolled in a MLTC program beginning prior to October 1, 2020.” It would be grossly unfair to disenroll an MLTC member on August 1<sup>st</sup> solely because they have been in a nursing home for 3 months, only to deny them re-enrollment on October 1<sup>st</sup> because they allegedly do not meet the new minimum ADL requirements. Clearly the grandfather clause was meant to protect current MLTC members, including those with temporary interruptions in their enrollment.

#### **6. Maintenance of Effort Requirements**

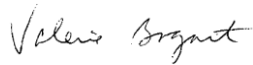
We question whether disenrolling tens of thousands of members from MLTC plans is permitted under the Maintenance of Effort (MOE) requirements of FFCRA and the CARES Act, still in effect. Question 25 of [CMS FAQs](#) issued April 13, 2020 says, “States seeking to claim the temporary FMAP increase are required to maintain an individual’s eligibility for benefits (through the end of the month in which the public health emergency ends) for which an individual attained eligibility under the state plan or a waiver of the state plan.” This FAQ gives an example concerning home and community-based services, stating that participation in a 1915(c) waiver may not be terminated even if the participant no longer meets the level of care criteria or other requirements for the waiver, such as receiving a service in the last 30 days. DOH is terminating enrollment of over 20,000 individuals in the 1115 MLTC waiver because they no longer qualify for the waiver under a newly approved criterion. There is no basis to treat services under an 1115 waiver any differently than 1915(c) waiver services under this CMS guidance. To comply with the MOE requirement as clarified by this guidance, the disenrollment should be delayed until the MOE requirements have ended.

\* \* \*

We ask you to delay sending these notices until after the public emergency has been declared over. If the notices do go out in July, the effective date of disenrollment should be changed to September 1st instead of August 1st to afford extra time for mail delivery and for family, Open Doors, ICAN, or MHLS to communicate with members to help them assert their right to appeal and/or request an assessment. Also, duplicate notices must be sent to the members' home addresses, if any, and to their designated representatives known to the nursing home and plan. Finally we ask you to confirm that anyone disenrolled who re-enrolls after Oct. 1<sup>st</sup> will not be subject to the new minimum ADL limitations.

Thank you for your cooperation.

Very truly yours,



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On behalf of the organizations listed above and:

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Center for Elder Law & Justice, Buffalo NY  
Medicaid Matters New York  
Mobilization for Justice, Inc.  
Neighbors to Save Rivington House

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