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NEW YORK LEGAL ASSISTANCE GROUP

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Memorandum in Support

Ensure Due Process for Consumers in Medicaid Managed Long Term Care Program

A.4996 (Gottfried)

The New York Legal Assistance Group (NYLAG) strongly supports A.4996, which protects the rights of some of the most vulnerable in our communities – elderly or disabled Medicare recipients who also are poor enough to qualify for Medicaid, known as *dual eligibles*. Compared to the general Medicare population, dual eligibles are three times more likely to be disabled, and have higher rates of diabetes, pulmonary disease, stroke, and cognitive problems like Alzheimer's disease.[1] Dual eligibles who need long term care services for more than 120 days are now subject to mandatory enrollment in Managed Long Term Care (MLTC) in New York City, Long Island, Westchester, and seven more upstate counties, with expansion planned for the rest of the state this year.

A. 4996 clarifies that dual eligibles are not "second class citizens" when it comes to critical fair hearing rights, guaranteed by the due process clause of the U.S. Constitution. Specifically, the bill addresses two disparities in the protections afforded enrollees that have emerged during the implementation of the Managed Long Term Care program:

1) Dual eligibles in the MLTC program are forced to go through all internal plan appeal processes before requesting a fair hearing;

2) Dual eligibles in the MLTC program can only obtain continued services pending an appeal in limited circumstances.

PROBLEM 1: Dual eligible Medicaid recipients mandated into MLTC plans cannot seek fair hearings unless they have exhausted internal plan appeal processes first.

The New York State Department of Health (the Department) is requiring dual eligible Medicaid recipients enrolled in MLTC to "exhaust" all internal appeals within their managed care plan before requesting a fair hearing when services are denied, reduced or terminated. This is being required for the first time ever in Medicaid managed care – and without legislative authority.

For twenty years, New York has never required Medicaid recipients enrolled in managed care plans – now numbering over 3 million – to exhaust the internal appeals in their plans before requesting a fair hearing. Only now, with the most vulnerable seniors and people with disabilities being required to enroll in MLTC plans, has the Department imposed this requirement on dual eligibles. Federal regulations do give states the option to

[1] Kaiser Family Foundation, *Medicare's Role for Dual Eligible Beneficiaries*, 2012.

require "exhaustion" of internal plan appeals.[2] But the Department of Health has unilaterally imposed this requirement in the mandatory MLTC program – with no public notice, no rulemaking with the opportunity for public comment, and most importantly, *no authority by the legislature*.

NYS must have a uniform appeals system for all Medicaid managed care plans. Requiring exhaustion in one type of managed care but not another is confusing to consumers and to State personnel who administer fair hearings. Mrs. Smith, who was enrolled in a Mainstream Medicaid managed care plan, may request a fair hearing without an internal appeal, to challenge the plan's reduction in her personal care services. But when she enrolls in Medicare at age 65, and transitions into an MLTC plan, she now must request an internal appeal from the MLTC plan. Then, when she transitions to a Fully Integrated Dual Advantage plan (FIDA) – no exhaustion is required. This is an unacceptable system.

This requirement to exhaust internal plan processes threatens to bar access to appeals for thousands of vulnerable people used to the existing system of requesting a fair hearing. Consumers who request a fair hearing when a plan denies an increase in home care hours could have their hearings dismissed months later because they did not request an internal appeal, even if by that time it is too late to request an internal appeal. Hearing requests have already been dismissed in New York City, where the MLTC program is already in operation.[3]

Also, **SOLUTION: A. 4996 would clarify, in statute, that dual eligibles have the same fair hearing rights as other managed care enrollees and are not required to exhaust internal appeals first.**

PROBLEM 2: Dual eligible are denied the right to continuation of services from a managed long term care plan while an appeal is pending except in limited circumstances.

The right to "aid continuing" is one of the most fundamental rights guaranteed by the Due Process clause of the Fourteenth Amendment. In *Goldberg v. Kelly*[4], the United States Supreme Court held that recipients of benefits are entitled to notice and a hearing *before* their benefits are reduced or terminated. New York State has complied with this Supreme Court ruling for over forty years by requiring local departments of social services to issue a written notice giving the right to request a hearing with "aid continuing" prior to reducing or terminating long term care services.[5]

In the MLTC program, however, the Department of Health has delegated the authority to authorize all Medicaid long term care services to plans, including the authority to reduce and terminate hours of home care services, with no advance notice and no right for the consumer to receive services while a hearing is pending, if the plan's service reduction coincides with the end of the plan's "authorization period" for the services.[6]

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[2] 42 C.F.R. § 438.402

[3] See Fair Hearing Decision #6107211H (issued 8/10/12), at http://www.otda.ny.gov/fair%20hearing%20images/2012-8/Redacted_6107211H.pdf;

6128239Y (issued 8/29/2012) at http://www.otda.ny.gov/fair%20hearing%20images/2012-8/Redacted_6128239Y.pdf;

6205588L (issued 1/30/2013) at http://www.otda.ny.gov/fair%20hearing%20images/2013-1/Redacted_6205588L.pdf

[4] 397 U.S. 254 (1970)

[5] 18 NYCRR §§ 358-3.6, 505.14(b)(5)(v)(b)

[6] The Department's policy limiting the right to aid continuing for ongoing long term care services is inconsistent with fundamental due process as set out by the U.S. Supreme Court in *Goldberg* and applied to New York's home care program by the federal court in *Mayer v. Wing*, 992 F. Supp. 902 (S.D.N.Y. 1996). In *Mayer v. Wing*, 992 F. Supp. 902 (S.D.N.Y. 1996) the federal court enjoined the local social services district from reducing services prior to issuing notices that justified the reduction based on

MLTC plans provide long-term home care services to individuals whose chronic conditions will rarely improve. Thus the need for ongoing long-term home care services is likely to continue beyond any authorization period the plan specifies. Indeed, the average period of receiving Medicaid personal care services in NYC was found to be 4.75 years in December 2008, with over 40 percent of personal care recipients receiving personal care services for at least seven years.[7]

Recent Example of Illegal Denial of Aid Continuing

In November 2013, a managed long term care plan threatened to reduce 24-hoursplit-shift continuous home care to 12 hours a day for Ms. D, a severely disabled New York City resident who cannot get out of bed or go to the bathroom without an aide's help. Though she requested a hearing, the managed care plan and the State's hearing office contended that she did not have the right to "aid continuing" for the months that the hearing would take, because the date of the threatened reduction coincided with the last day of the so-called "authorization period" of the services. She would have been left alone 12 hours per night had not NYLAG been able to reach a settlement in her case. But.. it could happen to her when the next authorization period ends -- and it could happen to thousands of others.

It is hard to overstate the harm caused by denying "aid continuing" for dual eligibles receiving long term care services. An individual whose 24-hour care is reduced to 8 hours/day would be at severe risk of harm if left alone 16 hours/day without care for several months, while a fair hearing is pending to challenge the reduction. Falls and other accidents, malnutrition, pressure sores could result. Without help to take medications, medical conditions could deteriorate. The result could lead to avoidable hospital stays, institutionalization and even death. It is the prevention of this irreparable harm that is the cornerstone of due process.

SOLUTION: A. 4996 clarifies that MLTC plans may not arbitrarily reduce long term care services at any time without the consumer having the right to seek review with services continuing pending that review.

For these reasons, NYLAG strongly supports the consumer protection provisions of A. 4996.

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a change in circumstances or a mistake in a previous service authorization and providing the opportunity for a hearing with aid continuing.

[7] S. Samis & M. Birnbaum, *Medicaid Personal Care in New York City: Service Use and Spending Patterns* (United Hospital Fund 2010), supra, at pp. iii-iv, 6-8.