WHY PENNSYLVANIA NEEDS A COMMUNITY HEALTHCHOICES OMBUDSMAN

I. Introduction

In 2018, Pennsylvania is moving many of its long-term care programs to managed care also called Managed Long-Term Services and Supports (MLTSS). MLTSS, which will be provided under a program named Community HealthChoices (CHC), is vastly different from the traditional fee-for-service system consumers have long used to obtain Long-Term Services and Supports (LTSS). Navigating managed care is complicated for everyone. Navigating managed care for LTSS is overwhelmingly complicated when one is frail, has significant care needs, and possibly facing healthcare and other crises.

Since MLTSS is such a new and complex delivery system for unfamiliar consumers to negotiate and because MLTSS consumers have critical needs that must be addressed timely and appropriately or they may face significant, unnecessary decline, many states have created ombudsman programs for MLTSS. Generally speaking, an ombudsman is a person or entity appointed to investigate and resolve issues or problems with and on behalf of a consumer. An ombudsman not only helps resolve individual problems but also has the ability to identify and address systemic issues to ultimately help consumers.

Pennsylvania should immediately work to create and fund an independent MLTSS ombudsman program to support consumers of Community HealthChoices and, at the same time, assist in the goals of the state to provide quality long-term care. Since CHC is a brand-new program, there is no benchmark quality data available for effective monitoring. In addition, new computer and communications systems will be used for the first time. Having an ombudsman program is essential to helping identify problems and systemic issues early on to help the state and the Managed Care Organizations (MCOs) address issues impacting consumers quickly during the implementation phase and throughout the ongoing operation of the program. Consumers need an independent resource outside of government and the MCOs to help resolve problems that fail to be addressed through normal processes.

II. Background

Community HealthChoices is the managed care LTSS program that will begin in the Southwest region of the state in January 2018. It will expand to the Southeast in July 2018 and to the remainder of the state in January of 2019. The program will provide MLTSS to more than 100,000 Pennsylvanians who currently use LTSS through nursing facilities or home and community-based services programs. Additionally, it will provide managed care for physical healthcare services to more than 420,000 Pennsylvanians
who have Medicare and Medicaid and who do not currently use LTSS through nursing facilities or home and community-based services programs.

The Commonwealth has a 20-year-old Medicaid managed care program, called HealthChoices. However, Medicaid recipients in nursing facilities or receiving Waiver services are not currently covered by Medicaid managed care but, receive their Medicaid through Fee-For-Service. In addition, those dually eligible for Medicare and Medicaid have not been covered by Medicaid managed care since 2006, when state policy changed due to the implementation of Medicare Part D prescription coverage. They too have been receiving their Medicaid physical health services through Medicaid Fee-For-Service.

III. What is an Ombudsman?

An ombudsman is a person or entity appointed to investigate and resolve issues or problems with and on behalf of a consumer. "Many consumers and policymakers believe ombudsman programs are a promising response to some of the problems associated with managed care. An "ombudsman" (or ombudsperson) has been described as a third party who intervenes to address the concerns of dependent individuals or groups in relation to powerful organizations or bureaucracies. An ombudsman is client-centered but not anti-administration - hence the role is slightly different from that of the advocate who answers only to the client and may adopt a purely adversarial stance vis-a-vis "the system."”

The best example of an ombudsman in Pennsylvania is the Long-Term Care Ombudsman Program.

Pennsylvania’s Long-Term Care Ombudsman Program is a key component of the Commonwealth’s efforts to assure quality in its aging and disability services sector. The Ombudsman provides advocacy services to consumers (regardless of age) of LTSS in the following settings: nursing homes, licensed personal care and assisted living residences, adult day services centers and domiciliary care homes, and will continue to serve consumers in these settings under CHC. Pennsylvania’s legislature intended the program to also assist consumers receiving LTSS in their own homes but the existing Ombudsman programs are not funded to provide these services. The Ombudsman program is authorized in the federal Older Americans Act and funded with both state and federal dollars.

The Ombudsman program is unique in its focus on consumer rights, self-determination, and autonomy. The primary emphases are on education and empowerment to support consumers and their families in self-advocacy, helping to resolve individual complaints and working on a systems and policy level to enhance the overall quality of long-term services and supports in Pennsylvania.

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1 Ombudsman Programs for Managed Care, Mary R. Anderlik, Health Law & Policy Institute available at: https://www.law.uh.edu/healthlaw/perspectives/Managed/990629Ombuds.html
2 71 P.S. section 581-3(a) 24.2 and APD #16-10-01
3 The Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701-716
IV. What is the Role of an Independent Ombudsman in a Managed Care System?

A managed care ombudsman is usually an independent entity or arm of government that is funded by the state to help program participants understand managed care, learn what is covered and how to get it, navigate enrollment and disenrollment, ask coverage questions, address coverage problems, understand notices received, and know how to exercise appeal and grievance rights. They serve as an objective resource to resolve issues between managed care plans and participants. They are often able to conduct impartial investigations on behalf of a participant, and to get matters resolved outside of the appeal and grievance process. Managed care ombudsman also provide an invaluable feedback loop to states, alerting the state to problems requiring immediate resolution and reporting on trends in participant experience with the managed care program.

V. Managed Care Ombudsman Programs in Other States

Before MLTSS Ombudsman programs were developed, many states already had managed care ombudsman programs or health advocates to help their Medicaid consumers navigate managed care. Many of these programs evolved with increased state utilization of Medicaid managed care.

As of March 2017, twenty-two states were operating a capitated MLTSS program. Seventeen have formally established the role of an MLTSS Ombudsman to help consumers navigate the managed care system. Ombudsman programs have developed with the growth of MLTSS. Guidance issued by the Centers for Medicare and Medicaid Services (CMS) in 2013 about MLTSS program design explicitly called on states to provide ombudsmen for their MLTSS programs. This guidance propelled several states to develop MLTSS ombudsman programs.

Additionally, since 2013, CMS has been operating a Medicare-Medicaid Financial Alignment Initiative. Through this demonstration program, states are integrating Medicare and Medicaid coverage and benefits for dually eligible consumers. Most programs include LTSS services and, thus, these programs are one type of MLTSS program that states may operate. Currently, there are demonstrations in twelve states. An ombudsman is required for each of these demonstration programs. CMS provides grant funding to many of the demonstration states to support their ombudsman programs for the demonstration participants.

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State MLTSS Ombudsman programs generally fall into one of two program models: states that subcontract services to an independent consumer advocacy or legal services organization and states that have leveraged or expanded their long-term care ombudsman programs to include a managed home care component. 8

Regardless of which model is employed, all programs operate under standard ombudsman principles, providing an independent advocate who is free of conflicts of interest with MCOs, government agencies or service providers, and is guided by the values of consumer direction and confidentiality.

In general, programs must function independently of health plans and the state Medicaid agency, be available to all beneficiaries or all those receiving MLTSS, be accessible through a variety of means and employ a range of outreach strategies to educate beneficiaries about the availability of ombudsman services.

In addition to helping beneficiaries access covered services and handling the traditional ombudsman role in complaint resolution, programs provide a range of other services, including:

- Assisting beneficiaries with varying levels of appeals.
- Helping consumers understand and exercise their rights.
- Training health plans and providers.
- Providing public information on beneficiary complaints and appeals.
- Providing systems level analysis and recommendations.
- Providing beneficiaries with independent health plan options counseling.

VI. New Legal Requirements for Beneficiary Support Services

In 2016, CMS issued new final regulations for Medicaid Managed Care. Prior iterations of the Medicaid Managed Care regulations did not speak to MLTSS at all. The new regulations have specific provisions addressing MLTSS, many of which were taken from the 2013 MLTSS Guidance to States. Section 42 CFR §438.71, requires states to develop and implement a beneficiary support system that provides support to managed care participants both prior to and after enrollment. This beneficiary support system must include choice counseling, assistance in understanding managed care, and, for LTSS consumers, ombudsman type services. Specifically, 42 CFR 438.71(d) requires: “At a minimum, the beneficiary support system must provide the following support to enrollees who use, or express a desire to receive, LTSS:

(1) An access point for complaints and concerns about MCO… enrollment, access to covered services, and other related matters.

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8 Virginia, for example, created a new component of Ombudsman, Coordinated Care Advocates, within its existing network of AAA Ombudsman services; State Units on Aging (SUA) in Colorado and Rhode Island contract with private non-profits for their State Ombudsman, who in turn manage local entities; Texas uses its existing program which is structured much like Pennsylvania’s. Information gathered from conversations with staff from the Administration on Community Living and various state ombudsman programs. In addition, see NASUAD, 2016. State Long Term Care Ombudsman Programs: Organizational Structure, at: http://www.nasuad.org/sites/nasuad/files/NASUAD%202016%20Ombudsman%20Rpt%20%2812%29.pdf
(2) Education on enrollees’ grievance and appeal rights within the MCO…; the State fair hearing process; enrollee rights and responsibilities; and additional resources outside of the MCO….

(3) Assistance, upon request, in navigating the grievance and appeal process within the MCO…, as well as appealing adverse benefit determinations by the MCO… to a State fair hearing. The system may not provide representation to the enrollee at a State fair hearing but may refer enrollees to sources of legal representation.

(4) Review and oversight of LTSS program data to provide guidance to the State Medicaid Agency on identification, remediation and resolution of systemic issues.  

At present, the Department of Human Services (DHS) has announced it plans to put the required beneficiary support services out for bid but has not verbalized including a separate independent entity to provide ombudsman services or any details. It is not clear whether the procurement will provide for a conflict-free entity that has the skill set to provide effective ombudsman services. A consumer is unlikely to want to address a plan problem to the plan itself or to complain to an Independent Enrollment Broker (IEB), and may be reluctant to complain to the state. Since the ombudsman is not part of the service system, consumers are comfortable working with the ombudsman, and the ombudsman can often resolve problems and complaints before they escalate to the level of appeals or create adverse outcomes for consumers. In whatever form the beneficiary support services requirements is implemented, it must include an independent ombudsman for Community HealthChoices participants receiving or trying to access LTSS.

VII. Pennsylvania

a. Does Pennsylvania need a MLTSS Ombudsman?

Pennsylvania needs a MLTSS Ombudsman. There are many reasons ombudsman services are needed for CHC. For starters, Pennsylvania is moving a massive number of consumers into a new delivery system. Any new delivery system is a considerable change with risk to participants. Risks include that services would be disrupted and health would be negatively impacted. There are examples of smaller scale system changes implemented by DHS that have had devastating impact on consumers such as the transition to a single financial management services provider, Act 22 that bypassed the normal regulatory review process to create new policies and rate changes impeding the ability of Aging Waiver participants to get needed care, and the current enrollment crisis that arose after an emergency procurement with Maximus, a private company serving as the Independent Enrollment Broker (IEB). Maximus assumed the role of Aging Waiver enrollment in April 2016 and problems with enrollment still remain including mismanagement of applications resulting in waits of up to six months and at times more.

A second reason is that managed care rules and processes are unfamiliar to the population and the target population is already vulnerable and at risk. Consumers who

9 Section 42 CFR §438.71 available at:
https://www.govregs.com/regulations/expand/title42_chapterIV_part438_subpartB_section438.71#title42_chapterIV_part438_subpartB_section438.71
don’t know or misunderstand the rules and do not know their rights can find themselves having lost services or being charged for something that should otherwise be covered. An independent MLTSS Ombudsman can provide outreach and education around rules and processes as well as help a participant who errs and requires help to resolve a mistake or mix-up.

Third, an independent entity is invaluable in evaluating the quality of the services being provided by the MLTSS plans. Despite many states flocking to the MLTSS model, there is no conclusive research supporting the efficacy of the model in improving quality of care or access to services. Having an independent advocate with boots on the ground will allow DHS to have real time access to quality of care information. As has been seen in the many states with managed care ombudsman programs, the ombudsman is often the first line of defense and the first place where implementation problems and trends are identified.

A fourth reason is that the Governor has proposed consolidating multiple departments under the auspices of one new Department of Health and Human Services. Ombudsman services should be separate from the payors and regulators of the programs for which they are serving as ombudsman. This is an opportune time to talk about how to improve ombudsman services.

A fifth reason to have an independent MLTSS Ombudsman is the consumer experience in other states. After the initial transitional coverage period, managed care plans may try to reduce longstanding services or service hours. An independent ombudsman can help consumers challenge those decisions. Those who receive LTSS are nursing facility clinically eligible and cannot handle interruptions in LTSS and/or physical healthcare services.

Finally, people eligible for both Medicare and Medicaid comprise the majority of the target population for Community HealthChoices. These individuals are sicker, poorer, frailer, more likely to have one of many chronic conditions, and have considerably lower literacy as compared to the general Medicare population. Many have Limited English Proficiency (LEP). In addition, all Aging Waiver consumers and nursing home residents whose care is funded through Medicaid will also have their behavioral health care transition from fee-for-service to a separate behavioral health managed care organization. In short, all may face challenges in adjusting to the new rules and processes for accessing healthcare and LTSS. An independent ombudsman that is trained and charged with assisting and advocating for this population will vastly improve the chances that participants have a good managed care experience.

b. Who should serve as Ombudsman?

State long-term care ombudsman programs have various organizational structures including: “within a cabinet-level State Unit on Aging (SUA); within a SUA, which itself is part of a large umbrella agency; outside the SUA but in an umbrella agency that includes SUA; within another state government agency (not the SUA); at an independent agency
within state government; or, outside state government within a contracted entity.” The MLTSS Ombudsman for Pennsylvania’s Community HealthChoices program should be an independent, conflict-free entity. It is essential to have an independent agency that has firewalls from government agencies in place to allow the ombudsman to effectively advocate when there may be differing policy positions from the Governor.

The existing Long-Term Care Ombudsman Program presently lacks resources and qualifications to serve as the MLTSS Ombudsman. Review of the program material for various demonstration projects highlight a number of new challenges for MLTSS Ombudsman in their expanded role in home and community-based services.

States that already have MLTSS Ombudsman have recognized the value of having an experienced advocate serve in this role. Half of the states in the CMS demonstration contract MLTSS services out to independent legal services or consumer advocacy organizations as a way of ensuring conflict-free services for consumers. Others (e.g. South Carolina) locate their program in a part of state government that is separate from the state Medicaid agency.

There are conflicts of interest in having the advocacy role housed in the same entity that advises consumers on enrollment choices or has a role in needs assessment. The MLTSS Ombudsman must be truly independent and conflict-free.

In addition to concerns about conflicts of interest, there is also the issue of adapting the ombudsman role to community-based settings and working with a more diverse community of people with disabilities. Stakeholders in an Illinois focus group, for example, suggested that families with whom consumers live could potentially interfere with the ombudsman relationship in a more profound way than is possible in a facility. Other issues revolve around insuring the ombudsman has authority to enter a consumer’s private home (when given consent) and how to protect medical and insurance records while allowing the ombudsman necessary access when investigating and resolving complaints.

Finally, to build upon the traditional skills of advocacy, complaint handling and knowledge of the long-term care system, MLTSS Ombudsman must gain added expertise related to their new roles. States’ training plans include modules on managed care and community-based long-term care generally; cultural competency, regarding not only ethnicity but different disability communities; and understanding the distinct role of a community-based advocate working in an individual’s home. There is a consensus that training should be ongoing. Ohio has developed a comprehensive and extensive professional development plan for the ombudsman. Virginia has published a list of training topics but has not yet developed a formal curriculum.

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10 National Association of State Units on Aging and Disabilities, State Long-Term Care Ombudsman Programs: Organizational Structure (May 18, 2016) at: http://www.nasuad.org/sites/nasuad/files/NASUAD%202016%20Ombudsman%20Rpt%20%2812%29.pdf
To summarize, CARIE recommends that Pennsylvania restructure its current Long-Term Care Ombudsman Program to be an independent entity and then provide the resources to expand the program to serve consumers who are receiving home and community-based services. Alternatively, Pennsylvania could opt to contract a CHC Ombudsman service out to an independent, qualified, conflict-free advocacy agency or legal service provider that is not providing LTSS or protective services.

VIII. Conclusion

An independent, conflict-free MLTSS Ombudsman program is essential so consumers can access help to meaningfully resolve problems. A MLTSS Ombudsman will advocate for any needed programmatic changes at the state and local levels, and will help hold the state and MCOs accountable to ensure consumers have access to quality care.

New federal Medicaid Managed Care regulations at 42 CFR 438.71 require states to have a beneficiary support system that can not only provide information and choice counseling but can also advocate for program participants and help them navigate the grievance and appeal processes. The components of this beneficiary support system must be independent from the managed care plan and the state. The regulations permit the choice counseling and advocacy services to potentially be provided by a single entity if sufficient firewalls can be erected to address conflicts but having both services provided by separate units within a single entity is not recommended. In addition to being independent and conflict-free, the entity to serve as ombudsman must have a comprehensive understanding of managed care, mastery of the full spectrum of rights, requirements, and services outlined in the Community HealthChoices program, and proven advocacy experience and expertise. This entity must be provided the funds necessary to handle the issues, concerns, and advocacy needs of the over 450,000 Pennsylvanians who will be enrolled into Community HealthChoices.

For the foregoing reasons, the Commonwealth must establish and fund an independent, conflict-free Ombudsman program for the Community HealthChoices MLTSS program.

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