

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBIN CASSIDY, individually and on behalf of
all persons similarly situated,

Plaintiff,

-against-

HOWARD ZUCKER, as Commissioner of the New
York State Department of Health,

Defendant.

17-cv-3397(ADS)(AKT)

**INTERVENOR
CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

PRELIMINARY STATEMENT

1. Intervenor Named Plaintiff Robin Cassidy, like deceased Named Plaintiff Salvatore Guadagna, and all members of the certified class are Medicaid recipients who have long-term illnesses and disabilities that make them dependent on long-term care services in order to continue living in their homes in the community. They have suffered reductions or terminations of their care in violation of the Medicaid Act, 42 U.S.C. § 1396 *et seq.*; the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

2. Defendant Zucker, as Commissioner of the New York State Department of Health (“DOH”), requires that Named Plaintiff and members of the certified class be enrolled in Managed Long Term Care plans (“MLTCPs”), in order to receive Medicaid funded long-term care services.

3. Prior to September 22, 2017, Defendant Zucker had not created or implemented a transition plan to protect enrollees’ rights when an MLTCP closed.

4. GuildNet, Inc. (“GuildNet”), a private not-for-profit corporation, was the MLTCP that provided the long-term care services upon which Plaintiff relied.

5. In March 2017, Defendant Zucker allowed GuildNet to send letters to all its enrollees in Nassau, Suffolk, and Westchester Counties stating that it would no longer provide long-term care services in those counties starting on June 1, 2017. An example of this letter is attached as Exhibit A.

6. The letter advised enrollees that if they wanted to continue to receive long-term care services, they would have to obtain those services from another MLTCP by June 1.

7. The letter did not inform the enrollees how, if at all, they could exercise their statutory and Constitutional rights to receive the same level of services, whether through GuildNet or another plan, until and unless they received timely and adequate notice and an opportunity for a Fair Hearing prior to any reduction or termination in care.

8. GuildNet enrollees were thus forced to reapply for services through other plans, but in many cases those plans would not schedule assessment dates promptly or before June 1.

9. GuildNet enrollees who were able to obtain new assessments from other plans were routinely offered amounts of care and/or services that were completely inadequate and substantially less than what they had been receiving through GuildNet.

10. In May 2017, after receiving complaints from enrollees and their advocates about GuildNet’s letter, Defendant Zucker sent a new letter to all GuildNet enrollees advising them that they did not need to transfer to a new plan by June 1, and that “the State requires GuildNet to continue providing your existing services until a smooth transfer can be completed to your new plan of choice.” A copy of this letter is attached as Exhibit B.

11. Like GuildNet's letter, Defendant Zucker's letter did not inform enrollees how, if at all, they could exercise their right to maintain their existing services until and unless they were given an opportunity for a Fair Hearing to challenge any proposed reduction.

12. Plaintiffs have been deprived of their statutory and Constitutional rights to a timely and adequate notice and a pre-reduction Fair Hearing, in violation of the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, and its implementing regulations; to live in the most integrated setting appropriate, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; and procedural and substantive due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. This action is authorized by 42 U.S.C. § 1983 as an action seeking redress of the deprivation of statutory and Constitutional rights under color of law. It is also authorized by the Americans with Disabilities Act, 42 U.S.C. § 12133, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794a(2), as an action seeking redress for discrimination on the basis of disability.

14. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b)(2) because it is the judicial district in which a substantial part of the events giving rise to the claims occurred and where the Named Plaintiff resides.

PARTIES

15. Plaintiff ROBIN CASSIDY is a 63 year-old woman who resides alone in Ronkonkoma, New York, located in Suffolk County. She is a recipient of Medicaid and Medicare who received long-term care services through GuildNet until June 1, 2017.

16. Defendant HOWARD ZUCKER is the Commissioner of DOH, and as such, is responsible for the administration of the Medicaid program in the State of New York. He maintains an office at Corning Tower, Empire State Plaza, Albany, New York.

THE APPLICABLE LEGAL FRAMEWORK

The Medicaid Act

17. The Medical Assistance Program (“Medicaid”) is a joint federal-state program established under Title XIX of the Social Security Act (“Medicaid Act”) to ensure that rehabilitation, medical care, nursing, and other services are provided to low-income and indigent people. 42 U.S.C. § 1396 *et seq.*

18. States that elect to participate in the Medicaid program must comply with requirements set out in federal law and regulations to be eligible for federal funds. 42 U.S.C. §§ 1396a, 1396c.

19. Federal law requires participating states to administer the Medicaid program through a “single state agency.” 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10(b)(1). While the single state agency may delegate certain functions, it is prohibited from delegating “the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters.” 42 C.F.R. § 431.10(c), (e).

20. The single state agency responsible for the administration of the Medicaid program in New York is DOH, of which Defendant Zucker is the Commissioner. N.Y. Soc. Serv. L. § 363-a(1).

21. Additionally, participating states must administer the Medicaid program according to a plan that has been federally approved. 42 U.S.C. § 1396-1; 42 C.F.R. § 430.15.

22. With the approval of the Centers for Medicare and Medicaid Services of the United States Department of Health & Human Services (“CMS”), New York operates its Medicaid program using a “Partnership Plan” that, in relevant part, requires most Medicaid recipients to enroll in a managed care organization (“MCO”) with which DOH has contracted.

23. MCOs are privately-owned and operated health insurance entities which contract with State Medicaid programs to provide Medicaid recipients with a package of covered services in exchange for payment by the State of a fixed amount per enrollee. *See* 42 U.S.C. § 1396b(m); 42 C.F.R. §§ 438.2, 438.6.

24. By definition, an MCO must make medical services available to its enrollees to the same extent as services are made available to other Medicaid recipients in the same area who are not enrolled in the plan. 42 U.S.C. § 1396b(m)(1)(A)(i).

25. Under the Medicaid Act, medical assistance includes payment of part or all of the cost of community based long-term care services. *See* 42 U.S.C. § 1396d(a)(1)-(29). These services are furnished to an individual who is not in an inpatient or institutionalized setting; are authorized by a physician; and are provided in accordance with the State’s Medicaid service plan. *See e.g.*, 42 C.F.R. §§ 440.167(a), 440.70, 440.110, 440.180, 440.181.

26. In approving the Partnership Plan, CMS expressly provided that, with the exception of four enumerated provisions of the Medicaid Act not relevant here, “[a]ll requirements of the Medicaid program expressed in law, regulation, and policy statement” continue to apply to New York’s Medicaid program. *See* Centers for Medicare & Medicaid Services, New York Medicaid Redesign Section 1115 Demonstration, Waiver No. 11-W-00114/2, Waiver Authority at 2 (effective as of Dec. 7, 2016), *available at* https://www.health.ny.gov/health_care/medicaid/redesign/docs/2015-10-01_1115_waiver_stcs.pdf.

Procedural Requirements Upon Termination of Medicaid Funded Services

27. Federal law and regulations, and the Due Process Clause, require timely and adequate notice to Medicaid applicants and recipients of any action to deny, discontinue, suspend or reduce medical assistance authorization or services. *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.206(b)-(c), 431.210, 431.211, 438.210(c)-(d), 438.404; U.S. Const. Amend. XIV, § 1.

28. Federal law and regulations also require that a state's Medicaid program provide Medicaid applicants and recipients an opportunity for an administrative Fair Hearing when Medicaid benefits are denied, reduced, or terminated. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.220, 438.402.

29. The required notice must, among other things, explain the proposed action; state the reasons for the action; explain the recipient's right to a Fair Hearing; and explain the right to "aid continuing," which means continuation of their services pending the outcome of the Fair Hearing. 42 C.F.R. §§ 431.206, 431.210, 438.404.

30. These notices must be sent to Medicaid recipients at least ten days before the proposed action is taken. 42 C.F.R. §§ 431.211, 438.404(c)(1).

31. When determinations are made to reduce or terminate Medicaid benefits, recipients who request a Fair Hearing in a timely manner are entitled to receive benefits unchanged pursuant to aid continuing directives until a decision after a Fair Hearing is issued. *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.230(a), 431.231(c), U.S. Const. Amend. XIV, § 1. Fair Hearing systems must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970). 42 C.F.R. § 431.205(d).

32. Once a plan of care is created and services are authorized for a Medicaid recipient, those services may be reduced or discontinued for reasons such as a change in the client's medical, mental, economic, or social circumstances such that the prior level of care is no longer appropriate; a mistake occurred in the previous assessment; the client refused to cooperate in having a required

reassessment; a specifically identified technological development rendered the services unnecessary or less time-consuming; the client resides in a facility or participates in a program that provides the services; or the client can be more appropriately served through other specifically identified Medicaid programs and services. 18 N.Y.C.R.R. § 505.14(b)(5)(iv)(a), (b)(5)(iv)(c).

33. Closure of an MLTCP is not a permissible reason for reducing or terminating a Medicaid recipient's care.

34. Federal regulations require New York to include certain provisions in all contracts with MLTCPs that provide Medicaid-funded services, including the requirement that MLTCPs comply with all applicable laws. 42 C.F.R. §§ 438.100(a)-(d), 438.3.

35. Pursuant to their contracts with the State, MLTCPs provide care and services to adult recipients of Medicaid and Medicare who need more than 120 days of long-term care services and meet certain other eligibility requirements. *See* MLTC Partial Capitation Model Contract at 16 (effective from Sept. 1, 2012 through Dec. 31, 2014), https://www.health.ny.gov/health_care/medicaid/redesign/docs/mrt90_partial_capitation_model.pdf; *see also* MAP Model Contract at 33 (effective from Jan. 1, 2011 through Dec. 31, 2011), https://www.health.ny.gov/health_care/managed_care/mltc/pdf/map_model_contract.pdf.

36. The services that MLTCPs provide pursuant to these contracts include medical services that enable Medicaid recipients to live safely in their homes that are collectively referred to herein as “long-term care services.”

37. The long-term care services that MLTCPs must provide include, but are not limited to, home care, Adult Day Health Care (“ADHC,” also known as medical model day care), physical therapy, speech therapy, occupational therapy, podiatry, audiology, optometry, dental care, medical transportation, nutrition, hearing aids, eyeglasses, and medical equipment. *See* 42 U.S.C.

§ 1396d(a)(1)-(29); 42 C.F.R. § 440.1 *et seq.* (defining the various services covered by the Medicaid program).

38. Home care services include, at a minimum, the personal care services essential to the maintenance of the patient's health and safety in his or her home, which can include preparing meals, assistance with personal hygiene, toileting, walking, and/or other identified tasks. *See* 42 U.S.C. § 1396d(a)(7), (a)(24); 42 C.F.R. § 440.167; N.Y. Soc. Serv. L. § 365-a(2)(e)(i); N.Y. Comp. Codes R. & Regs. tit. 18 § 505.14(a); *see* Centers for Medicare and Medicaid Servs., STATE MEDICAID MANUAL § 4480(C), at 4-495 (1999), *available at* <https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html> (describing Medicaid coverage of personal care services).

39. Home care services also include full- or part-time nursing, home health aide services, medical supplies, and home-based physical therapy. *See* 42 U.S.C. § 1396d(a)(7); 42 C.F.R. § 440.70; N.Y. Soc. Serv. L. § 365-a(2)(d); N.Y. Comp. Codes R. & Regs. tit. 18 § 505.23.

40. ADHC provides health care services during the daytime to functionally impaired individuals in a group setting. 10 N.Y.C.R.R. § 425.1(a). ADHC participants, called "registrants," do not reside at the program but rather attend ADHC for a given number of hours, depending on their plan of care. *Id.* § 425.1(b),(d). After their visit is over, they return to their homes.

41. ADHC registrants receive a variety of services during their visits, including but not limited to physical therapy, speech therapy, nutrition assessment, occupational therapy, psychosocial assessment, rehabilitation and socialization, nursing evaluation and treatment, coordination of referrals for outpatient health, planned therapeutic or recreational activities, assistance with activities of daily life such as toileting, eating, bathing including routine skin care, ambulation, and dental services. *See* 10 N.Y.C.R.R. § 425.5; DOH, Adult Day Health Care,

https://www.health.ny.gov/health_care/medicaid/program/longterm/addc.htm (last visited Aug. 31, 2017).

42. Long-term care services also include other types of medical services, such as physical therapy. *See* 42 U.S.C. § 1396d(a)(11). For the purposes of the Medicaid program, “[p]hysical therapy means services prescribed by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law and provided to a beneficiary by or under the direction of a qualified physical therapist . . . includ[ing] any necessary supplies and equipment.” 42 C.F.R. § 440.110(a)(1).

43. Defendant Zucker retains the responsibility for ensuring that the rights of Medicaid recipients enrolled in MLTCPs are protected. 42 C.F.R. § 438.100(a)-(d).

44. To that end, federal law requires Defendant Zucker to supervise the activities of MLTCPs that provide Medicaid-funded services to New Yorkers, including by auditing MLTCPs’ records and patient files. *See* 42 C.F.R. §§ 438.66, 438.340(b)(4), 438.416, 438.228(b).

Section 504 of the Rehabilitation Act

45. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”), provides that “[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).

46. Medicaid is subject to the requirements of Section 504, because it is a federally funded program. 42 U.S.C. § 1396-1.

47. The Rehabilitation Act defines an “individual with a disability” as any person who:

- (a) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual;

- (b) [has] a record of such an impairment; or
- (c) [is] regarded as having such impairment...

29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1).

48. Because “unjustified institutional isolation of persons with disabilities is a form of discrimination,” the Rehabilitation Act ensures that disabled individuals receive public services in the most integrated settings appropriate. *See* 28 C.F.R. §§ 41.51(d), 84.4(b)(2); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597, 600-02 (1999).

The Americans with Disabilities Act

49. Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12131 *et seq.*, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

50. The ADA defines a “public entity” as “any department, agency . . . or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1)(B).

51. DOH is a public entity subject to the requirements of Title II of the ADA.

52. The ADA and the Rehabilitation Act define disability in virtually identical ways.

53. Because “unjustified institutional isolation of persons with disabilities is a form of discrimination,” the ADA ensures that disabled individuals receive public services in the most integrated settings appropriate. *See* 28 C.F.R. § 35.130(d); *Olmstead*, 527 U.S. at 597, 600-02.

FACTS CONCERNING THE CLASS

54. MTLCPs in New York State are all fully or partially capitated, meaning they receive from Defendant Zucker a fixed amount of funding per enrollee, regardless of the number of hours of home care or the amount and type of other long-term care services the MLTCP provides to that individual.

55. Because of the fixed rate, MLTCPs have an incentive to provide enrollees with fewer hours of care or fewer services than are medically necessary

56. Members of the proposed class depend on Medicaid-funded long-term care services in order to remain safely in their own homes.

57. They are all disabled as defined by the ADA and Section 504.

58. In many cases these individuals would need to permanently reside in a Medicaid-funded nursing home or other institution if not for their long-term care services.

59. Members of the class are very vulnerable. By definition, they cannot manage alone. They have multiple chronic conditions, many of which will not improve and which are in fact degenerative, and they require home care services for basic activities of daily living including ambulation, toileting, and cooking.

60. Prior to 2012, most Medicaid recipients who required home care or other long-term care services received that care directly from their local Social Services districts. The Social Services district would determine the number of home care hours or other services a recipient required and contract with a home care agency to provide an aide for the requisite hours.

61. As of 2012, most recipients of both Medicare and Medicaid residing in New York State who were eligible for community-based long-term care and were expected to need at least 120 days of such care were required to enroll in a MLTCP.

62. A few groups of people, including new applicants with immediate needs, continue to receive such services through their local Social Services districts.

63. Each MLTCP must provide the same package of core benefits.

64. When Medicaid recipients were required to switch from getting their long-term care services through Social Services districts to getting them through MLTCPs, they had the option to choose their own MLTCP or to let a state contractor named Maximus auto-enroll them in a plan.

65. For that initial transition, enrollees were provided with specific transition rights. Each enrollee was entitled to keep the same care they had received through their Social Services district for at least the first 90 days of their enrollment in an MLTCP. CMS, Partnership Plan Medicaid Section 1115 Demonstration, Waiver No. 11-W-0114/2, Special Terms and Conditions at 20 (effective from April 1, 2013 through Dec. 21, 2014), *available at* https://www.health.ny.gov/health_care/managed_care/appextension/docs/special_terms_and_conditions_04_2013.pdf.

66. Once the 90 days elapsed, the MLTCP could reduce the amount of care, but only if it first provided an adequate and timely notice and all attendant Fair Hearing rights. *See id.*

67. Medicaid recipients were required to enroll in an MLTCP in order to continue receiving long-term care services, but they did not need to accept a reduction in services as a condition of that enrollment.

68. There are approximately 15 to 25 MLTCPs operating in each of the three counties relevant here.

69. MLTCPs do not provide home care aides directly. They contract with vendor agencies which hire and pay the aides.

70. MLCTPs also provide other medical services, like physical therapy or ADHC, indirectly. They contract with medical providers that furnish those services.

71. Once an individual is enrolled in an MLTCP, her home care hours, ADHC hours, or other ongoing services, can only be reduced or terminated pursuant to an adequate and timely

notice with attendant Fair Hearing rights. The enrollee is entitled to keep her current services pending the outcome of the Fair Hearing. At any Fair Hearing regarding a reduction or termination, the MLTCP bears the burden of proving that the reduction or termination is lawful.

72. MLTCP enrollees have the right to switch plans at any time. If an enrollee wants to switch plans, she or he can request an assessment from other plans operating in her area.

73. In the event of this type of voluntary transfer to a new plan, the new plan does an assessment of the individual's needs, and notifies the individual of what services the plan believes the individual needs. The individual can choose to accept those services and switch plans, or reject those services and stay in her current plan.

74. In 2016, an MLTCP named HomeFirst, which had operated in several upstate counties, announced that it was going out of business.

75. Despite requests from enrollees and their advocates, Defendant Zucker did not provide any transition rights to HomeFirst enrollees who were required to switch to a different MLTCP.

76. Medicaid advocacy groups repeatedly asked Defendant Zucker to institute a policy requiring that enrollees of a closing MLTCP keep their long-term care services at their current levels until they had received the timely and adequate notice and attendant administrative hearing rights required for any adverse action.

77. Now, Elderplan's HomeFirst has announced that it intends to close in Suffolk County imminently, resulting in more Medicaid recipients facing the same problem now faced by GuildNet enrollees.

78. Northwell has also recently stopped accepting new enrollees and intends to close in 2018.

79. Despite the fact that additional MLTCPs are closing and/or scaling back their operations in New York State, Defendant Zucker has established no policy that protects enrollees' due process rights when their MLTCPs close or cease operations in certain counties.

80. As a result, when an MLTCP closes, the enrollees of that MLTCP are forced to reapply for their benefits and risk losing them, even though they remain entitled to continue to receive those benefits.

81. On November 15, 2016, GuildNet informed Defendant Zucker that it would "not be enrolling any additional members into GuildNet programs in Nassau, Suffolk and Westchester," and would "seek [DOH] assistance in vacating these counties while [GuildNet] consider[s] [its] options for the remainder of GuildNet." GuildNet Letter to DOH (Nov. 15, 2016), *available at* <http://www.nyshcp.org/assets/0/72/300/304/318/15622/aabc779d-47f1-4ccd-ab21-2e3a38d078c8.pdf>.

82. As of March 1, 2017, GuildNet MLTC had the largest enrollment of any MLTCP in Suffolk and Nassau Counties, and one of the larger enrollments in Westchester County.

83. As of March 2017, GuildNet had 1,990 enrollees in Suffolk County, 35% of the total MLTCP enrollee population for that county of 5,735; it had 1,753 in Nassau County, 27% of the total MLTCP enrollee population for that county of 6,438; and it had 451 enrollees in Westchester County, 10% of the total MLTCP enrollee population for that county of 4,685.

84. By contrast, several other plans have fewer than 100 enrollees per county.

85. In March 2017, GuildNet sent its enrollees in the three counties relevant here a letter advising them that "GuildNet will no longer offer Managed Long Term Care (MLTC) services in [your county] effective June 1, 2017. It is important that you select a new MLTC plan

before May 18, 2017 to assure a smooth transfer to your new plan. You will continue to receive services from GuildNet until your transfer to your new plan is complete.” Ex. A, GuildNet Letter.

86. The GuildNet letter did not tell enrollees that they had a right to keep their existing long-term care services until and unless they were given an opportunity for a Fair Hearing at which to challenge any proposed reduction, whether in GuildNet or in a new MLTCP.

87. The GuildNet letter did not inform enrollees of what would happen if they had not found a new plan by June 1, 2017.

88. The GuildNet letter did not explain whether the statement that the enrollee would continue to receive services from GuildNet until transferring to a new plan meant only between May 18 and June 1, or for as long as it took to find a new plan that would maintain the same hours they were receiving from GuildNet.

89. Upon information and belief, Defendant Zucker approved the March 2017 GuildNet letter in advance of it being sent to enrollees.

90. Medicaid advocacy groups requested meetings with Defendant Zucker to seek a transition plan for GuildNet enrollees to ensure that they could keep their current hours when they switched to a new MLTCP.

91. Upon information and belief, at one of those meetings, DOH employees stated that any GuildNet enrollee who switched to a new MLTCP after receiving the GuildNet letter did so “voluntarily.” As a result, the individual was considered to be voluntarily giving up her current hours and accepting whatever home care hours were offered by the new plan.

92. Upon information and belief, Defendant Zucker had not directed MLTCPs operating in Westchester, Suffolk and Nassau Counties to accept GuildNet enrollees at their current level of home care until September 22, 2017.

93. Because there were thousands of GuildNet enrollees seeking to change plans, many other MLTCPs operating in the three counties in question told GuildNet enrollees that they did not have the capacity to assess them before May 18, 2017.

94. The Named Plaintiff and many other class members were told that they could not be assessed by some plans prior to the deadline listed in the GuildNet letter.

95. The Named Plaintiff and many other class members who were assessed by other MLTCPs were offered drastically fewer home care hours, ADHC hours, and other types of long-term care services, including physical therapy sessions, than GuildNet was providing them.

96. Individuals who are offered fewer long-term care services by other plans cannot challenge those determinations at Fair Hearings unless they first agree to be enrolled in the new plan with the reduced amount of care.

97. If they do agree to be enrolled in the new plan and request a Fair Hearing, the issue at the hearing is the alleged “inadequacy” of care as opposed to “reduction,” and aid continuing is not available. This means that they must live with reduced care while they wait for their hearing and subsequent determination.

98. Additionally, MLTCP enrollees who request a hearing on the adequacy of their care, rather than on a proposed reduction, bear the burden of proving that they need more care at their Fair Hearing. In a hearing regarding a proposed reduction, on the other hand, the MLTCP bears the burden of proving that the reduction is warranted.

99. In response to complaints by enrollees and their advocates, on or about May 13, 2017, Defendant Zucker sent a letter to GuildNet enrollees in these counties informing them that they do not need to transfer to a new plan by June 1, and that “the State requires GuildNet to

continue providing your existing services until a smooth transfer can be completed to your new plan of choice.” Ex. B, DOH Letter.

100. Defendant Zucker’s letter did not inform enrollees that they had a right to continue to receive their existing services until and unless they were given an opportunity for a Fair Hearing to challenge any proposed reduction or termination.

101. Defendant Zucker’s letter did not inform enrollees when GuildNet was actually closing nor by what date they must choose a new plan.

102. Until September 22, 2017, Defendant Zucker had not established a transition plan to ensure that enrollees whose MLTCPs close would continue to receive the level of care they were receiving from their plans until and unless they had the opportunity for a Fair Hearing at which to challenge any proposed reduction in care, whether the care would be provided by the original MLTCP or a new one.

103. As a result of Defendant Zucker’s failure to establish and implement an adequate transition plan, Plaintiffs were required to accept fewer hours of care or fewer services to avoid a complete termination of services upon GuildNet’s closing.

104. During this lengthy period of transition, Plaintiffs not only shouldered the burden of finding their own care, but also suffered anxiety as a result of the uncertainty created by Defendant Zucker.

FACTS CONCERNING NAMED PLAINTIFFS

105. On August 8, 2019, District Court Judge Spatt certified a class in this matter and named Mr. Guadagna the class representative. (ECF #125.)

106. Mr. Guadagna died on April 30, 2020 of COVID-19.

107. Robin Cassidy moved for leave to intervene as class representative on October 14, 2020; leave was granted on September 13, 2021. (ECF #190.)

Facts from Amended Complaint Regarding Now-Deceased Class Representative Guadagna

108. Salvatore Guadagna is 87 years old and lives in Northport, New York in Suffolk County.

109. He lives alone.

110. In 2008, he suffered a stroke and, as a result, he is paralyzed on the left side of his body and has lost most of the mobility in his left hand, so that he cannot grasp or hold objects in that hand.

111. Mr. Guadagna needs a wheelchair to get around, both in his home and outside.

112. In 2014, he applied for Medicaid and was accepted. Because he needed home care, he enrolled in GuildNet.

113. A nurse from GuildNet came to his house to determine how much help he needed. She determined that he needs 24 hours per day “live-in” care.

114. Approximately one year ago, Mr. Guadagna also started to receive Adult Day Health Care (“ADHC”) services through GuildNet. He would attend the ADHC program one day per week.

115. At the ADHC program he received medical model adult day health services including physical therapy, occupational therapy, and a bath.

116. The bath was important because he weighs over 300 pounds and his home health aide is not able to bathe him on her own. He can only get sponge baths from the health aid at home.

117. Physical therapy was important because it helped him maintain his physical strength and stamina, so that he could walk a few steps and perform tasks in his daily life more readily. During his physical and occupational therapy, he also worked to unclench his hand a bit, which increased the mobility of his hand so that he could use it to hold things down. For example, after receiving physical therapy, Mr. Guadagna can use his left hand to hold his plate in place while eating.

118. In March 2017, Mr. Guadagna received a letter stating that GuildNet would no longer be operating in his county as of June 1, 2017, and that he had to choose a new plan by May 18, 2017 so that he could be enrolled by the June 1 deadline.

119. The letter did not state what would happen if he did not act before May 18, or whether he could keep his current hours.

120. At the time, he was temporarily in a rehabilitation center recovering from a roughly week-long episode of gout, which left him with little strength to complete daily living activities. His doctor originally misdiagnosed his ailment, which is why he was left suffering from the disease for a week.

121. After receiving the March GuildNet letter, Mr. Guadagna's daughter, Andrea Kennedy, called Northwell, which evaluated him while he was at the rehabilitation center.

122. Northwell informed him that if he enrolled with them, he would continue to receive 24 hour per day home care, but that his ADHC services would be terminated.

123. He was very anxious to return home, and he was afraid that if he stayed with GuildNet, he would have to go back to an institutional setting when GuildNet closed, so he decided to enroll in Northwell.

124. He transferred from Guildnet to Northwell on May 1, 2017.

125. He came home from the rehabilitation center on or about May 1, 2017.

126. Since Mr. Guadagna returned home, he has not attended ADHC because Northwell did not approve it. Even though ADHC was part of his plan of care with Guildnet, it was discontinued when he enrolled with Northwell.

127. He never received any written notice that said his ADHC would be terminated upon enrolling with Northwell, but he was informed by Northwell verbally. He was never told that he could challenge the termination of his ADHC at a Fair Hearing.

128. Without ADHC Mr. Guadagna has had no physical or occupational therapy. As a result, he has lost a great deal of physical strength and mobility. He can no longer take a few steps and can no longer use his clenched hand at all in his daily life.

129. Without ADHC he has not been able to take a proper bath. As a result, he has only been able to have sponge baths, and had not had a proper bath or shower since before May 1, 2017.

130. Mr. Guadagna was recently told that his new plan, Northwell, is closing, just like GuildNet. As a result, his daughter Andrea plans to call other MLTCPs to schedule assessments because of the possibility that he will have to switch plans, again, before Northwell closes.

Facts Regarding Intervenor Class Representative Robin Cassidy

131. Robin Cassidy is a 63 year old woman who lives alone in Ronkonkoma, NY.

132. She suffers from Amyotrophic Lateral Sclerosis (ALS) and is unable to care for herself.

133. As a result of her ALS, Ms. Cassidy has very limited mobility.

134. Prior to her ALS diagnosis, Ms. Cassidy had a sarcoma in her left knee that resulted in a fusion of the left leg, which limited her mobility.

135. As a result of both the sarcoma and the ALS, Ms. Cassidy needs assistance in all aspects of her life. She cannot move from her own bed.

136. She also suffers from type 2 diabetes, asthma, narcolepsy, and osteoarthritis.

137. Ms. Cassidy is a Medicaid recipient, and has been enrolled in an MLTCP for many years in order to receive home care.

138. Upon information and belief, Ms. Cassidy enrolled in GuildNet in 2011 or 2012.

139. Ms. Cassidy is partially incontinent. She uses a bed pan, but requires assistance getting on and off of it. She is not always able to get on the bed pan in time to prevent an accident.

140. As a result, she needs adult diapers (chux) and incontinence foam (Bedside Care, a bathing and perineal skin cleanser), in order to prevent skin breakdowns. The foam is critical to her health, because it prevents fecal matter from sticking to her body, causing dangerous sores.

141. By 2017, Ms. Cassidy was receiving 15 hours of home care per day from GuildNet, as well as the incontinence supplies she needed.

142. GuildNet also provided Ms. Cassidy with the medical equipment that she needed to be safe. She had a glucometer for diabetes connected to a computer. GuildNet set it up so that if her glucose got too high or too low, it notified a nurse, who could talk to her to determine if she was ok or needed more help.

143. In March 2017, Ms. Cassidy received the letter telling her that GuildNet was closing in her county and that she would have to choose a different MLTCP.

144. Ms. Cassidy made calls to several different MLTCPs to try to find one that would give her everything she was getting from GuildNet.

145. Ms. Cassidy believed that she did not have much time to enroll in another plan, because GuildNet would be closing, and she could not survive in the community without aides, equipment, and the supplies she needs.

146. Ms. Cassidy had great difficulty getting the MLTCPs to come and assess her. One plan, Aetna, said they would give her only 8 hours a day.

147. Ms. Cassidy was very afraid that if she did not choose a plan quickly she would be left with no home care and would have to move into a nursing home, which she did not want to do.

148. Centers Plan for Healthy Living (“CPHL”) offered Ms. Cassidy 15 hours a day of home care, the amount of time she was receiving from GuildNet, so she enrolled with CPHL in approximately June, 2017.

149. Ms. Cassidy was so frantic trying to get at least 15 hours per day of care, that she did not inquire whether the new plan would provide all the equipment or supplies that she had been getting from GuildNet.

150. CPHL did not provide Ms. Cassidy with a glucometer. She had no way of knowing if my blood sugar levels were too high or too low. This was extremely dangerous because without knowing the levels, she was unable to take any action to keep her blood sugar stable.

151. Ms. Cassidy was eventually able to order a glucometer herself, through Medicare, and when it arrived, it showed that her blood sugar was dangerously out of control. Since receiving the glucometer, she have been able to test regularly and keep my blood sugar levels stable.

152. CPHL has never given Ms. Cassidy the incontinence supplies that she was getting from GuildNet and that are critical to her health.

153. GuildNet had supplied Ms. Cassidy with chux (adult diapers) that were thick enough to keep her dry and with incontinence foam, a bathing and perineal skin cleanser.

154. CPHL did provide Ms. Cassidy with some chux, but they were so thin and fell apart so quickly that she would have to wear two or three at a time to stay dry and clean for even a little while. As a result, Ms. Cassidy was both uncomfortable and always at risk of running out of chux.

155. CPHL has never given Ms. Cassidy the incontinence foam.

156. As a result of being without adequate chux and the critical cleansing foam, Ms. Cassidy have suffered from Stage 1, Stage 2, and close to Stage 3 decubitus ulcers on her sacral area and buttocks.

157. As a result of these very painful sores, she had to have the doctor come to her home. She prescribed medication to prevent infections and to soothe the pain.

158. The sores also had to be treated with Duoderm dressings for wound care, but CPHL does not supply that either.

159. Ms. Cassidy must go to the hospital for treatment of her nephrostomy bag every six weeks. She told the aides at the hospital that she was not getting the kind of chux she needed. Because the aides recognized how important the chux are for her skin integrity, the aides at the hospital gave her the correct kind of chux, and on subsequent visits to the hospital they gave her more. However, she has no assurance that the hospital will continue to provide her with these chux as they are supposed to be paid for by CPHL.

160. The hospital does not give Ms. Cassidy the incontinence foam or Duoderm she needs, so she has had to buy these medical supplies for herself, despite her limited income.

161. Ms. Cassidy has asked Centers Plan many times for these supplies, but they have never supplied them.

162. Ms. Cassidy never received a notice informing her that the provision of her glucometer and incontinence supplies would be discontinued, or that she had the right to challenge the loss of supplies at a fair hearing.

CLASS ACTION ALLEGATIONS

140. Named Plaintiff Robin Cassidy brings this action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of herself and as representative of a class of:

All Medicaid recipients who were enrolled in the GuildNet managed long-term care plans in Suffolk, Nassau, or Westchester County as of March 1, 2017 and who suffered reductions in care without prior notice and opportunity to be heard when they transferred to new managed long-term care plans as a result of GuildNet's closure in their counties of residence.¹

141. The class is so numerous that joinder of all class members in this action would be impracticable. As of March 1, 2017, GuildNet provided Medicaid-funded long-term care services to approximately 1,990 members in Suffolk County, 1,753 in Nassau County, and 451 in Westchester County.

142. Moreover, it would be impracticable for potential plaintiffs, who are, by definition, elderly, disabled, and low-income individuals, to obtain legal services on an individual basis for

¹ Plaintiffs note, for the Court's convenience, that there is an outstanding dispute between the parties over the Class Definition. Pursuant to Judge Spatt's Oct. 29, 2019 instruction, the parties met and conferred regarding Defendant's proposed motion to limit the class definition. Throughout discovery, Defendant repeatedly represented that the Transition Policy (MLTC Policy 17.02), which established that Medicaid recipients who transfer to new MLTCPs due to the anticipated closure of their former plans must receive the same plan of care for at least a guaranteed transition period of 120 days, became effective immediately upon its issuance on September 22, 2017, and that all of the individuals who appear to have lost care had transferred on or before October 1, 2017. Therefore, based entirely upon Defendants' representations, on November 15, 2019, Plaintiff agreed to amend the class to include only individuals who transferred out of GuildNet on or before October 2, 2017. Stevens Ltr. Re: Agreement on Class Definition, Nov. 11, 2019 (ECF #140). While preparing to send the post-certification notice to Class Members, however, Defendant informed us that 208 of the individuals who appeared to have lost care upon transfer out of GuildNet had transferred after October 2, 2017. Plaintiffs therefore wrote to Judge Spatt withdrawing their consent to the temporal limitation of the class definition, and asking that the definition revert to that certified on August 8, 2019. Stevens Ltr. Revoking Consent to Amend Class Definition, Jan. 31, 2020 (ECF #147), Stevens Reply Ltr., Feb. 11, 2020 (ECF #158). Defendant disagrees. Nese Opposition, Feb. 10, 2020 (ECF # 154). Judge Spatt did not issue a ruling on this disagreement.

their claims. Hence their rights under the law may well be meaningless without certification of a class action seeking common redress.

143. Questions of fact common to the class predominate over any individual questions, including whether Defendant Zucker had failed to create a transition plan to protect enrollees when an MLTCP closes; whether Defendant Zucker failed to ensure that GuildNet enrollees were given services equal to those they were receiving from GuildNet when they switched plans because of GuildNet's closing, until and unless they were given timely and adequate notice, aid continuing, and an opportunity to challenge any reduction prior to such reduction; whether Defendant Zucker allowed GuildNet to send a letter to its enrollees about its plan to close, even though the letter did not inform enrollees of their right to continue to receive their same level of services, whether through GuildNet or another plan, unless and until they have an opportunity for a Fair Hearing; whether some GuildNet enrollees, alarmed by GuildNet's notice of closing, switched to other plans with lower levels of care, without the opportunity for a Fair Hearing and aid continuing; and whether these actions by Defendant Zucker risk unnecessary institutionalization of members of the proposed class.

144. There are questions of law common to the class, including the question of whether the alleged acts of Defendant Zucker violate the rights of members of the proposed class under the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, and its implementing regulations; the ADA, 42 U.S.C. § 12131 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

145. The claims of Named Plaintiff Robin Cassidy are typical of the claims of the class in that she was a GuildNet enrollee who received the March 2017 letter informing her of the plan's closure on June 1, 2017 and lost managed long term care services without an opportunity to

challenge the reduction in or termination of care through a Fair Hearing before she was forced to accept that reduction in or termination of care.

146. The Named Plaintiff will adequately represent the interests of the class. The Named Plaintiff is a member of the proposed class and there are no conflicts of interest between the Named Plaintiff and other proposed class members.

147. The Named Plaintiff and all proposed class members would benefit from a declaration that Defendant Zucker violated the Medicaid Act, the ADA, Section 504, and the Due Process Clause of the Fourteenth Amendment, by allowing GuildNet to send the March notice and by failing to ensure that class members were able to keep their existing hours, either from GuildNet, their local Social Services district, or another plan until they received adequate notice of a reduction and the opportunity for a pre-reduction hearing.

148. The Named Plaintiff and all members of the proposed class would benefit from an injunction ensuring that all long-term care services that they were receiving from GuildNet be restored to them, until and unless they receive timely and adequate notice and have an opportunity for a Fair Hearing to challenge any proposed reduction in care.

149. Plaintiffs are represented by the New York Legal Assistance Group (“NYLAG”). NYLAG attorneys are experienced in class action litigation concerning Medicaid, including the Medicaid home health services program.

FIRST CAUSE OF ACTION

150. Defendant Zucker’s failure to ensure that, despite GuildNet’s threatened or actual closure, Named Plaintiff and members of the Certified Class had their long-term care benefits continued at their existing levels until and unless they received a timely and adequate notice of their right to aid continuing and an opportunity for a Fair Hearing at which to challenge any

proposed reduction or termination violated Plaintiffs' rights under the Medicaid Act, 42 U.S.C. § 1396a(a)(3), its implementing regulations, and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

SECOND CAUSE OF ACTION

151. Defendant Zucker's failure to ensure that Named Plaintiff and members of the certified class did not have their long-term care benefits reduced or terminated based on impermissible, non-individualized criteria when GuildNet terminated or threatened to terminate its services in their counties of residence violated Plaintiffs' substantive due process rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to be free from arbitrary, irrational, and capricious government decisions.

THIRD CAUSE OF ACTION

152. Defendant Zucker's failure to ensure that Named Plaintiff and members of the certified class maintained their long-term care services during an involuntary transfer to a new MLTCP or GuildNet's closure threatened to result in unnecessary institutionalization of class members, in violation of their right to receive services in the most integrated setting appropriate to their needs as guaranteed by Title II of the ADA, 42 U.S.C. § 12131, *et seq.*, and its implementing regulations, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment as follows:

1. Declaring that:

a. Defendant Zucker's failure to ensure that Plaintiffs had their long-term care benefits continued at their GuildNet level until and unless they had timely

and adequate notice of their right to aid continuing and an opportunity for a Fair Hearing at which to challenge any proposed reduction or termination, regardless of when GuildNet closed or Plaintiffs enrolled in a new plan, violated Plaintiffs' rights under the Medicaid Act, 42 U.S.C. § 1396a(a)(3), its implementing regulations, and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;

b. Defendant Zucker's failure to ensure that Plaintiffs did not have their long-term care benefits reduced or terminated based on impermissible, non-individualized criteria when GuildNet terminated its services in their counties of residence violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution; and

c. Defendant Zucker's failure to ensure that Plaintiffs maintained their long-term care benefits during an involuntary transfer to a new MLTCP threatened to result in unnecessary institutionalization of class members, in violation of their right to receive services in the most integrated setting appropriate to their needs as guaranteed by Title II of the ADA, 42 U.S.C. § 12131, *et seq.*, and its implementing regulations, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulations.

3. Permanently enjoining Defendant Zucker to ensure that Class Members who switched to new MLTCPs as a result of GuildNet's March 2017 letter and are receiving fewer services than they received from GuildNet be restored to the level of care they previously received while enrolled in GuildNet until and unless they are provided with a timely and adequate notice and an opportunity for a Fair Hearing at which to challenge the reduction; and

4. Awarding reasonable attorney's fees under 42 U.S.C. § 1988(b), 29 U.S.C. §

794a(b), and 42 U.S.C. § 12205.

5. Awarding costs and disbursements.
6. Granting such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues triable by a jury.

Dated: New York, New York
September 15, 2021

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