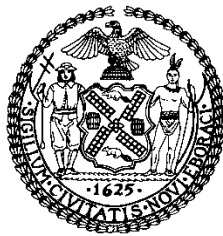


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THE COUNCIL OF THE CITY OF NEW YORK

BRIEFING PAPER OF THE HUMAN SERVICES DIVISION

Matt Gewolb, Legislative Director

COMMITTEE ON AGING

Hon. Margaret Chin, Chair

February 7, 2017

OVERSIGHT: SOCIAL ADULT DAY CARE FOLLOW-UP

INTRODUCTION

On February 7, 2017, the Committee on Aging, chaired by Council Member Margaret Chin, will hold a hearing on *Social Adult Day Care Follow-Up*. This hearing will review the implementation and impact of Local Law 9 of 2015 (Local Law 9), of which section three took effect on the day of enactment on January 17, 2015, section one went into effect on January 17, 2016 and section two went into effect on July 17, 2015. The hearing will examine the second mandated report, issued by the Ombudsperson for the Social Adult Day Care program pursuant to Local Law 9. Those invited to testify include representatives from the New York City Department for the Aging (DFTA), service providers, and advocates.

BACKGROUND

New York City is currently home to 1.55 million individuals 60 and older - roughly, 18.2 percent of the city's population and the population of older New Yorkers is expected to increase significantly in the coming years (12.8 percent of New York City's population is currently between 50-59 years old).¹ By 2040, more than one out of every five New Yorkers will be 60 and older.² This trend is likely to continue, as life expectancy at birth is at an all-time high for New York City.³ As its population continues to age, the city will face a growing demand for supportive care services, including social adult day care (SADC) programs.⁴

Overview of Social Adult Day Care Programs

Social Adult Day Care (SADC), a form of Adult Day Services (ADS), is a program which provides functionally impaired individuals such as those suffering from Alzheimer's, dementia, or

¹ N.Y.C. Department for the Aging, *Annual Plan Summary April 1, 2017-March 31, 2018* (September 2016), at 8, available at <http://www.nyc.gov/html/dfta/downloads/pdf/AnnualPlanSummaryFY1617V2.pdf>

² *Id.* at 8.

³ *Id.* at 9.

⁴ These are also sometimes referred to as social adult day services (SADS). This paper will refer to them as social adult day cares (SADCs).

other chronic health conditions with socialization, supervision, monitoring, personal care and nutrition in a protective setting during part of the day.⁵ ADS programs are intended to offer a cost-effective alternative to in-patient services while allowing the individual receiving services to maintain a higher quality of life.⁶ The National Adult Day Services Association identified 5,685 adult day service programs operating in the United States in 2014.⁷ According to a 2010 MetLife study, more than 260,000 participants and family caregivers are served nationally through these programs.⁸ In New York State, over 15,000 older individuals receive Medicaid-funded SADC services each year.⁹ As New York City's older adult population is expected to increase by 50 percent within the next two decades, SADC programs are likely to remain a critical component of the care-giving system.¹⁰

SADC programs serve a particularly vulnerable segment of older adults by providing a secure environment where participants can receive services designed to help them achieve optimal levels of physical and mental cognitive functioning.¹¹ Caring for a functionally-impaired family member often places a great burden and stress on loved ones and social adult day care programs can provide caregivers with much-needed respite, as well as an opportunity to continue working.¹²

⁵ 9 N.Y.C.R.R. § 6654.20.

⁶ MetLife Mature Market Institute, *The MetLife National Study of Adult Day Services: Providing Support to Individuals and Their Family Caregivers* 3 (Oct. 2010), available at <https://www.metlife.com/assets/cao/mmi/publications/studies/2010/mmi-adult-day-services.pdf>.

⁷ National Adult Day Services Association, "About Adult Day Services," <http://www.nadsa.org/learn-more/about-adult-day-services/> (last accessed February 1, 2017)

⁸ MetLife Mature Market Institute, *supra* note 6.

⁹ New York State Office of the State Comptroller, Division of State Government Accountability, *Report 2014-S-31: Social Adult Day Services* 1 (December 2015), available at <https://www.osc.state.ny.us/audits/allaudits/093016/14s31.pdf>

¹⁰ MetLife Mature Market Institute, *supra* note 6, at 3; N.Y.C. Age Friendly Commission, *Age Friendly: A Progress Report* (Spring 2011), available at http://www.nyam.org/agefriendlynyc/Age-Friendly-NYC-Report-Final-High-Res2_new.pdf.

¹¹ N.Y. State Office for the Aging, Social Adult Day Services Program (SADS), <http://www.aging.ny.gov/NYSOFA/Programs/CaregiverSvcs/SADS.cfm> (last accessed February 3, 2017).

¹² *Id.*

While properly managed SADC programs provide an essential service, the lack of regulation and oversight of these programs has created an opportunity for unscrupulous providers to open programs that may endanger the welfare of vulnerable seniors, threaten the funding of senior centers, and lead to fraudulent Medicaid practices.

New York State does not require a license, certification, or registration to operate a social adult day care program.¹³ There is also no application process with the State to apply to become a social adult day care provider.¹⁴ However, social adult day care programs that receive funding from the New York State Office for the Aging (SOFA) or local aging offices, such as DFTA, must comply with minimum requirements set forth in regulations promulgated by SOFA.¹⁵ These regulations were adopted by SOFA in 1994, and have not been updated in over 20 years.¹⁶ SOFA regulations require social adult day care programs to adhere to service standards that include participant eligibility requirements, admission and discharge instructions, and the development of a service plan for each consumer.¹⁷ Programs must provide socialization services, supervision and monitoring, personal care and nutrition.¹⁸ Allowable optional services include maintenance and enhancement of daily living skills, transportation between the home and the program, caregiver assistance, case coordination and assistance.¹⁹ In December 2015, New York State Comptroller Thomas P. DiNapoli released an audit of SOFA and the New York State Department of Health (NYSDOH)'s oversight of SADC programs which concluded that the regulations are "broad in

¹³ See N.Y. Elder Law § 215; 9 N.Y.C.R.R. § 6654.20.

¹⁴ *Id.*

¹⁵ 9 N.Y.C.R.R. § 6654.20(a).

¹⁶ New York State Office of the State Comptroller, *supra* note 11, at 8.

¹⁷ 9 N.Y.C.R.R. § 6654.20(a).

¹⁸ *Id.*

¹⁹ *Id.*

nature and in some cases lack detailed measures that would be helpful in evaluating program quality and performance.”²⁰

To ensure accountability, programs must also establish, file, and follow the program’s written policies and procedures regarding the operation of the program with the area aging office for review.²¹ Programs must conduct self-evaluations, maintain records of the program and participants, as well as adhere to staffing requirements including staff training.²² In May 2015, NYSDOH issued new guidance that requires SADCs contracting with a Managed Long-Term Care (MLTC) Plan to complete a self-certification with NYSDOH that the program meets the standards and requirements set forth in the SOFA regulations.²³ New SADC programs must complete an electronic certification form prior to contracting with an MLTC plan, while existing programs must recertify their compliance. Even with this new requirement, there is no mechanism for ensuring that the monitoring and certification data provided by SADC providers is accurate.²⁴

Area aging offices, such as DFTA, are responsible for oversight of directly-funded programs.²⁵ In the FY 2017, DFTA oversees ten SADCs that receive a total of \$1.35 million in funding.²⁶ The Council allocated \$950,000 to fund these programs and DFTA funded the remaining \$400,000.²⁷ DFTA’s Bureau of HealthCare Connections oversees the ten discretionary SADC contracts.²⁸ According to DFTA’s 2017 Annual Plan, the Department anticipates providing 17,577 hours of social adult services in FY 2017.²⁹

²⁰ New York State Office of the State Comptroller, *supra* note 11, at 8.

²¹ *Id.*

²² *Id.*

²³ New York State Office of the Medicaid Inspector General, Social Adult Day Care Certification, <https://www.omig.ny.gov/sadc-certification> (last accessed February 3, 2017)

²⁴ New York State Office of the State Comptroller, *supra* note 11, at 11.

²⁵ *Id.* at § 6654.20(c).

²⁶ Communications with City Council Finance Staff

²⁷ *Id.*

²⁸ N.Y.C. Department for the Aging, *supra* note 1, at 29.

²⁹ N.Y.C. Department for the Aging, *supra* note 1, at 52.

Fraud Concerns and “Pop-Up” Programs

Local Law 9 emerged because of numerous concerns over the proliferation of unregulated SADC programs in recent years, and abuses that followed as a result. The number of these programs in New York City grew rapidly between 2010 and 2012, from 40 to nearly 200, largely in response to the new availability of Medicaid reimbursement funds.³⁰ In 2011, growing Medicaid costs combined with a projected \$10 billion budget deficit led Governor Andrew Cuomo to propose significant changes to New York State’s Medicaid program.³¹ Following a series of reforms and redesign, Medicaid beneficiaries now receive long-term care in residential or community settings through managed long-term care (MLTCs).³² MLTCs provide or arrange for health and long-term care services, including SADC.³³ Operators may receive Medicaid reimbursement through MLTCs for providing SADC, but as long as the operators are not receiving SOFA or City funding, there are no direct government regulations in place to ensure the programs are providing proper and safe services.³⁴

Reports of inappropriate recruitment tactics by providers emerged, such as offering cash payments and free meals.³⁵ While New York State took some steps to attempt to limit fraudulent

³⁰ Nina Bernstein, *Day Centers Spout Up, Luring Fit Elders and Costing Medicaid*, N.Y. TIMES, Apr. 22, 2013, available at <http://www.nytimes.com/2013/04/23/nyregion/day-centers-lure-fit-elders-and-bill-medicaid.html?pagewanted=all>

³¹ Thomas Kaplan, *State Proposal Would Limit Annual Rise for Medicaid*, N.Y. TIMES, Feb. 24, 2011, available at <http://www.nytimes.com/2011/02/24/nyregion/24medicaid.html>.

³² Medicaid Redesign Team Proposal No. 90; Press Release, N.Y. State Dept. of Health, *Medicaid Redesign Progresses as New York State Health Department Begins Accepting Applications for Managed Long-Term Care Providers* (June 14, 2011), available at http://nyhealth.gov/press/releases/2011/2011-06-14_long_term_care_medicaid.htm; and L. 2011, Ch. 51, Part H §§ 41, 41-a, 41-b *et al.*

³³ N.Y. Public Health Law § 4403-f(1)(d).

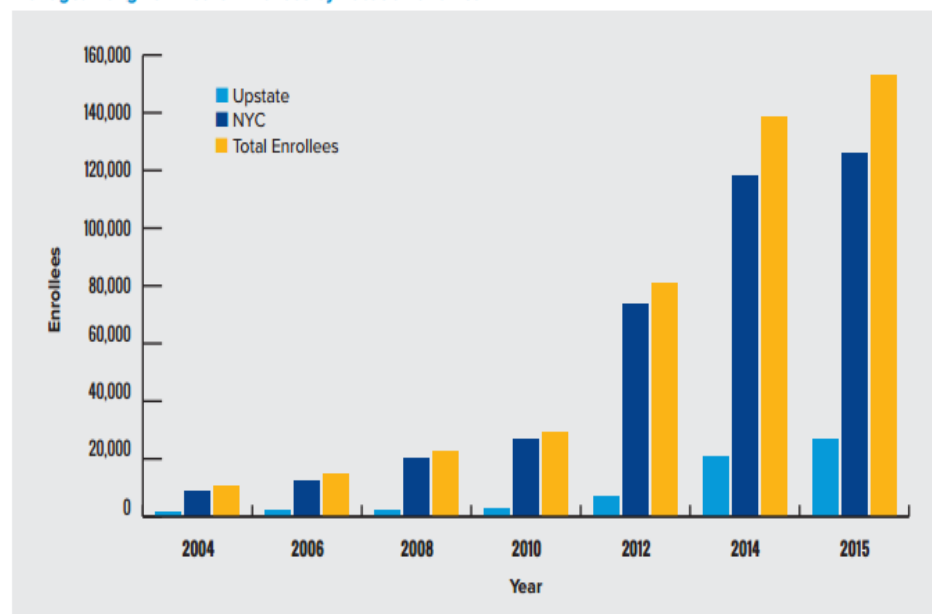
³⁴ Bernstein, *supra* note 30.

³⁵ *Id.*; Bernstein, *supra* note 30.

Medicaid reimbursements to SADC programs,³⁶ the City Council continued to receive reports of new businesses purporting to be SADC programs without offering proper services for functionally impaired adults.

The November 2015 Managed Long Term Care Report released by the State Department of health, found that there were 153,191 MLTC members in New York State and that 120,000 individuals enrolled in MLTC plans (roughly 82 percent) are from New York City.³⁷ As the chart below shows, there has been a significant increase in MLTC members in New York City since the Medicaid Redesign Team issued changes to the MLTC requirements in 2011.³⁸

Figure 1
Managed Long-Term Care Enrollees by Location and Year



³⁶ Nina Bernstein, *New York Suspends Enrollment in Long-Term Care Plan*, N.Y. TIMES, Apr. 25, 2013, available at <http://www.nytimes.com/2013/04/26/nyregion/new-york-suspends-enrollment-in-long-term-care-plan.html>.

³⁷ New York State Department of Health 2015 Managed Long Term Care Report, available at: https://www.health.ny.gov/health_care/managed_care/mltc/pdf/mltc_report_2015.pdf

³⁸ Id. at

On January 5, 2017 Brooklyn Democratic District Leader, Charles Ragusa, called on Albany to act on the Adult Day Care Programs he has observed as acting like “Medicaid Mills,” noting that they cater to people who are in better health and have fewer problems in order to make a profit.³⁹

Local Law 9 of 2015

In May 2014, Council Member Margaret Chin introduced Int. No. 358, which sought to regulate those social adult day care programs that did not receive funding from the state or city.⁴⁰ The Committee on Aging and the Committee on Health first held a hearing on this legislation on September 4, 2014, at which time testimony was heard from the New York City Department of Health and Mental Hygiene (DOHMH), DFTA, advocates and service providers.⁴¹ Subsequently, Int. No. 358 was amended to require registration of social adult care programs, to place primary responsibility of regulation of social adult day care programs with DFTA, and to expand the role of the social adult day care ombudsperson provided for in the legislation.⁴² The bill was signed into law on January 17, 2015, as Local Law 9 of 2015 (Local Law 9) and became effective 180 days after enactment.

As enacted, Local Law 9 requires that all social adult day cares (SADCs) that do not receive grant funding pursuant to the State Elder Law meet the standards and requirements promulgated by SOFA for publicly funded programs related to program standards and participant rights.⁴³

³⁹ Kings County Politics, *District Leader Ragusa Calls on Elected Officials to Stop “Medicaid Pimps”*, Kelly Mena (January 5, 2017) available at: <http://www.kingscountypolitics.com/district-leader-ragusa-calls-elected-officials-stop-medicaid-pimps/>

⁴⁰ Council of the City of New York, Int. No. 358 (May 29, 2014), available at <http://legistar.council.nyc.gov/View.ashx?M=F&ID=3413746&GUID=EAC6B7ED-0CE1-4A7F-BE71-86D74D9109C8>

⁴¹ Council of the City of New York, Report of the Committee on Health and the Committee on Aging (Dec. 16, 2014), available at <http://legistar.council.nyc.gov/View.ashx?M=F&ID=3419689&GUID=48B62C67-B79B-42A0-BD47-FCFFED699C11>

⁴² *Id.*

⁴³ N.Y.C. Administrative Code §21-204(a)(1).

DFTA was required to adopt rules establishing civil penalties between \$250 and \$500 per day for SADCs and specifying those violations subject to penalty.⁴⁴ The law required that such rules be adopted 12 months after the law's enactment.⁴⁵ As of the date of this hearing, DFTA has not proposed any rules concerning SADCs.

Furthermore, all SADCs operating in the city are mandated to register with DFTA.⁴⁶ This requirement took effect on July 17, 2015.⁴⁷ All current (as of that date) SADCs were required to register with DFTA no later than November 1, 2015, and programs established after November 1, 2015 must register with DFTA within two weeks of establishment.⁴⁸ DFTA's prescribed registration form requires each SADC to provide, at a minimum⁴⁹:

- The program's name, tax ID number, site address, phone number, days and hours of operation, and year of establishment;
 - Certification that the program site is compliance with the Americans with Disabilities Act (ADA);
 - Whether or not the program has certified with the New York State Office of the Medicaid Inspector General, and if not, an explanation of the failure to certify;
 - The name, title, phone number, and email address of its director;
 - Information about its corporate structure, including the entity type and corporate address;
- and

⁴⁴ *Id.* at §21-204(c)(1).

⁴⁵ Local Law 9/2015, §4(i).

⁴⁶ N.Y.C. Administrative Code §21-204(b)(1).

⁴⁷ Local Law 9/2015, §4.

⁴⁸ N.Y.C. Department for the Aging, NYC Social Adult Day Care, http://www.nyc.gov/html/dfta/html/community/social_adult_day_care.shtml (last accessed February 3, 2017)

⁴⁹ N.Y.C. Department for the Aging, Social Adult Day Care (SADC) Registration Form, http://www.nyc.gov/html/dfta/html/social_adult_dc/SocialAdultDCRegForm.shtml (last accessed February 3, 2017)

- The name, address, and phone number of each MTLC, which with the program has a formal agreement.

Any entity that operates as a SADC without registering is subject to a civil penalty of \$250 to \$1,000 per day.⁵⁰ The responsibility is on the SADC to provide updated registration information as changes occur.⁵¹

Local Law 9 authorizes DFTA and employees of another agency designated by the Mayor to issue notices of violation for failure to register or follow program standards.⁵² No such agency appears to have been designated within 30 days after the law was enacted, the Department of Consumer Affairs (DCA) should have been automatically authorized to issue such notices along with DFTA, and it remains unclear if DCA has been issuing those notices.⁵³

Finally, Local Law 9 established an ombudsperson at DFTA whose responsibilities include:

- Establishing a system to receive comments and complaints with respect to any SADC;
- Requesting a list once annually of certified SADCs operating within the city from the state Department of Health;
- Investigating complaints and any information known to DFTA that a SADC may be in violation of the provisions of Local Law 9; and

⁵⁰ N.Y.C. Administrative Code §21-204(b)(1).

⁵¹ *Id.* at §21-204(c)(2).

⁵² *Id.* at §21-204(b)(2).

⁵³ Local Law 9/2015, §3.

- Upon finding that there has been such a violation, the ombudsperson must notify the SADC and reimbursing MLTC of the violation and request that the MLTC respond to the ombudsperson about if and how such violations will be addressed.⁵⁴
- The ombudsperson may also, at their discretion, forward the results of the investigation and the response from the MLTC to appropriate governmental entities.⁵⁵

All SADCs must prominently post a sign onsite with information on how to contact the ombudsperson, and that a person may contact the ombudsperson if they have a comment or complaint regarding the SADC.⁵⁶ Individuals seeking to make a complaint or comment regarding any SADC in the City may do so by calling 311 or entering a complaint through DFTA's online portal.⁵⁷

Social Adult Day Care Ombudsman's 2016 Report

The second report (or the Report) of the Social Adult Day Care Ombudsperson was received on January 30, 2017.⁵⁸ The Report indicates that there are 298 registered SADCs, but only 283 are active because 15 sites have closed.⁵⁹ This is an increase of 50 active sites between December 30, 2015 and December 31, 2016.⁶⁰ The greatest number of SADCs are in Brooklyn,

⁵⁴ N.Y.C. Administrative Code §21-204(d)(1).

⁵⁵ *Id.* at §21-204(d)(1)(iii)(B). These include: the Department of Investigation, the State Department of Health, or any other office, agency, or entity responsible for the prevention, detection, and investigation of fraud and abuse related to the Medicaid program.

⁵⁶ *Id.* at §21-204(d)(2).

⁵⁷ N.Y.C. Department for the Aging, Social Adult Day Care (SADC) Inquiry Form, http://www.nyc.gov/html/dfta/html/social_adult_dc/SADCInquiryForm.shtml (last accessed February 2, 2017)

⁵⁸ The Social Adult Day Care Ombudsperson's Report was due to the City Council on January 1, 2017

⁵⁹ *Id.*

⁶⁰ N.Y.C. Department for the Aging, *Social Adult Day Care Ombudsperson City Council Report* (Jan. 1, 2016). Report on file with the Committee on Aging

which has 122 SADCs, followed by Queens with 93. There are 29 SADCs in Manhattan, 27 in the Bronx, and 12 in Staten Island.⁶¹

The Report indicates that 51 programs required follow-up for missing or incorrect information.

From December 31, 2015 to December 31, 2016, the Ombudsperson's office received 50 complaints about 39 sites.⁶² Eleven sites were the subject of multiple complaints, nine of which received two or three complaints. The Report indicates that, "in some circumstances, one complainant made repeated complaints; in other cases multiple complainants made similar complaints."⁶³ One of the eleven sites closed. One program received five complaints and the other program received sixteen complaints, both complaints centered on payments to participants. In some instances, one complainant made repeated complaints.

The Report categorizes the fifty complaints into seven categories including, activities, facilities, food, Medicaid fraud, participant behavior, staff and transportation.⁶⁴

According to the Report, the Ombudsperson made inquiries with reviews to determine appropriate next steps for all of the fifty complaints received. The Report indicated that all complaints were referred to the SADC, its contracted MLTCs and the N.Y.S. oversight agencies including, the Office of Medicaid Inspector General, Department of Health, and the N.Y.S. Office of the Aging. Thirteen complaints were referred to other City agencies as specific complaints fell within their respective jurisdictions. Those City agencies included the Department of Health's

⁶¹ *Social Adult Day Care Ombudsperson City Council Report*, (January 1, 2017) *Supra Note* at 58

⁶² The Ombudsperson's Report from 2015 indicated that they received 9 complaints from July 1, 2015 to December 30, 2015

⁶³ *Supra Note*, at 58.

⁶⁴ *Id.*

Bureau of Community Sanitation, the FDNY, the Department of Buildings, and the Commission on Human Rights.⁶⁵

The SADC Ombudsperson's office made nine visits to program sites in response to complaints where issues of program safety or accessibility had been raised. After these visits, concerns were found to be unsubstantiated or where appropriate referrals were made to City agencies for follow-up.⁶⁶

Although DFTA is required by Local Law 9 to promulgate rules in order to issue violations, the Report indicates that DFTA has not issued any notices of violation.⁶⁷ According to the Report, DFTA is still working with the law department to finalize the rules.⁶⁸

Investigation of two complaints revealed that two programs were not registered. Once notified about the requirement to register with SADC Ombudsperson, one program completed their registration, and the SADC Ombudsperson is working with the second program to complete their registration.⁶⁹

The Report indicates that as of April of 2016 the SADC Ombudsperson sent out reminder notifications to all registered programs regarding the posting of SADC Ombudspersons complaint and inquiry contact information. All programs received electronic and hardcopy sample signage in English, Spanish, Russian, Chinese, Korean, Haitian Creole and Italian.⁷⁰ The programs were provided links to the New York State office on Aging Social Adult Day Care Standards.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

Finally, the Report indicated that with respect to recommendations, the SADC Ombudsperson suggests that the 1994 New York State Office for the Aging Social Adult Day Standards should be amended so that they are more specific. Accordingly, the Ombudsperson's office has raised the issue with NYSOFA, according to the Ombudsperson's Report.⁷¹

CONCLUSION

SADC programs provide an essential service to older New Yorkers, and necessary respite to their caregivers. However, with the proliferation of unregulated operators in recent years, many older adults found themselves targeted by providers for recruitment to sites providing subpar services below the standards established for state and city-funded entities. Local Law 9 of 2015 represented an important step in bringing accountability to these operators, but it is critical that DFTA, working with its state partners, remains vigilant in enforcing registration requirements and program standards. Today, the Committee expect to hear from DFTA regarding its implementation of Local Law 9, as well as its continued oversight over SADCs in New York City.

⁷¹ Id.