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**VIA EMAIL & OVERNIGHT MAIL**

Hon. Howard A. Zucker, M.D., J.D.  
Commissioner of Health  
N.Y.S. Department of Health  
Corning Tower Building  
Empire State Plaza  
Albany, New York 12237

Re: Suspension of All In-person Adult Day Health Care Program Services

Dear Commissioner Zucker:

On behalf of the Adult Day Health Care Council (the “Council”), we write to respectfully request that the Department of Health (“DOH”) permit Adult Day Health Care (“ADHC”) programs to resume providing services in person, subject to appropriate restrictions to prevent the spread of COVID-19.

As discussed below, the Council believes that the ADHC programs have been treated in an arbitrary and discriminatory fashion, resulting in catastrophic economic damage to the industry and the loss of necessary health care services to thousands of New Yorkers. For nearly nine months, without justification or explanation, DOH has shuttered ADHC in-person programs throughout the State. At the same time, however, the State has permitted virtually all other business establishments to serve the public, including restaurants, shopping malls and even gyms. Moreover, DOH permits health care programs comparable to ADHC programs — such as Social Adult Day Services (“SADS”) programs, Programs of All-Inclusive Care for the Elderly (“PACE”), and OPWDD (“Office for People with Developmental Disabilities”) Day Services — to provide services in person.

No rational reason exists for treating ADHC programs differently than other businesses and in-person health care programs. ADHC programs are no more prone to exposing individuals to COVID-19 than any other commercial businesses. Accordingly, DOH’s statewide closure of all in-person ADHC programs is susceptible to legal challenge, on multiple grounds.

**I.**  
**Background**

On March 17, 2020, DOH closed all ADHC program services through a statewide directive (hereinafter referred to as “the Suspension Order”).<sup>1</sup> The Suspension Order required all ADHC program administrators and directors to provide immediate formal notification of their program’s temporary suspension to certain individuals and entities including, but not limited to program registrants, next of kin, program staff, physicians, long-term care ombudsman, and Medicaid managed care long-term care providers. Additionally, the Suspension Order required program administrators and directors to “take all necessary steps to assist registrants in identifying and finding services that they may need to address their current needs and maintain record of such correspondence.”<sup>2</sup>

The day after DOH issued the Suspension Order, Governor Cuomo sought to buttress it by issuing Executive Order 202.5.<sup>3</sup> It “temporarily suspend[ed] . . . Part 425 of Title 10 of the NYCRR and section 461-k of the Social Services Law, to the extent necessary to prevent transportation to and attendance at adult day care programs, until authorized by the Commissioner of Health.”<sup>4</sup> Significantly, in contrast to other programs and services temporarily suspended or modified by Executive Order 202.5, ADHC programs were ordered to stay closed “until authorized by the Commissioner of Health” to be reopened.<sup>5</sup>

On March 28, 2020, DOH amended the Suspension Order by permitting ADHC programs to provide services telephonically and via telehealth.<sup>6</sup> The Amendment, however, explicitly provided that

ADHC facilities cannot re-open to provide in-person services to clients. The intent of the suspension is to prevent individuals, especially the elderly and those who are immune compromised, from potential exposure to COVID-19. The only services that ADHC facilities may provide are services provided telephonically, or via telehealth.<sup>7</sup>

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<sup>1</sup> See Department Directive to ADHC Program Administrators/Directors (Mar. 17, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> See Executive Order 202.5 (Mar. 18, 2020).

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

<sup>5</sup> Executive Order 202.5 remains in effect through January 1, 2021. It was extended through subsequent Executive Orders, the last of which was Executive Order 202.79 (December 2, 2020).

<sup>6</sup> See Department Memorandum to ADHC/Program Administrators/Directors (Mar. 28, 2020) (the “Amendment”).

<sup>7</sup> *Id.* In May 2020, DOH issued a Medicaid Update providing guidance on the use of telehealth services during the state of emergency. See Department Medicaid Update (May 1, 2020).

The impact of the Suspension Order has been catastrophic for the ADHC industry. Eleven ADHC programs are permanently closed (and will never reopen); and six are indefinitely closed. Approximately 1,300 employees have been laid off, with many more to follow if the Suspension Order remains in effect.

On May 29, 2020, the Council provided DOH with a proposal to reopen ADHC programs. Specifically, the Council recommended that DOH open ADHC programs in stages, depending on the program's geographic region and proximity to sponsoring nursing homes. The Council also provided guidelines on how ADHC programs can prevent the spread of COVID-19 and safely care for registrants.

In September 2020, DOH shared with the Council a draft health advisory for the reopening of ADHC programs. The advisory provided a roadmap for the process of evaluating the effectiveness of infection control standards and practices.

Since September, all progress towards reopening ADHC programs has come to a halt. DOH has provided the Council with no guidance on when or under what circumstances ADHC programs may be permitted to reopen in the future.

## II. ADHC Programs Provide Critical Services to New Yorkers

ADHC programs are community-based, long-term care programs that provide comprehensive health care services in a congregate day setting. Programming includes medically supervised services, as well as personal care and socialization to individuals with physical and mental impairments or chronic illnesses. ADHC programs may be provided off-site or co-located with nursing homes and vary greatly in the number of individuals served; square footage and configuration of program space; and geographic location.

ADHC programs provide critical services to some of the most vulnerable New Yorkers. This includes a large population of individuals diagnosed with severe and chronic mental illness, who are most at risk for physical and mental health complications due to prolonged isolation. For many individuals, ADHC programs are their only outlet for interacting with others.

Because of the Suspension Order, registrants across the State have gone without basic, necessary personal care, nutrition and skilled nursing services. This has led to a spike in preventable hospitalizations and nursing home placements, and to the degradation of the health and hygiene of registrants.

While ADHC programs have been providing services telephonically, some individuals have not left their homes since the suspension was instituted. Additionally, few registrants have access to the internet or to two-way visual phones, so the ability to participate in telehealth services is limited. In any event, physical therapy is a big component of the

services ADHC programs provide, which requires registrants to participate in person. Unfortunately, the lack of in-person services has resulted in registrants experiencing increased isolation, further exacerbating depression and other mental health issues. For example, ADHC programs average two hospitalizations per six-month period, but during the suspension, the average has spiked to eight inpatient hospital admissions and ten emergency room visits per month. Nursing home placements have also increased.

The Council has heard from innumerable family members of registrants and program administrators about the devastating impact the Suspension Order has had on registrants. What follows is a representative sample of comments received by the Council:

- *My dad is becoming less independent as each day passes. The medication and lack of stimulation causes him to sleep most of the day and to get up multiple times during the night. In addition to helping him get up, dressed, eat, take medications, go to the bathroom, shower, etc., my mom has to hold a job caring for children without ever having a good night's sleep. I am concerned for her physical and mental well-being as much as I am for his. The care center being open is essential for them to have a somewhat normal life. (The Lutheran Care Network, Poughkeepsie)*
- *The majority of my registrants are living alone and have their family members visiting rarely, remotely or not at all. We had an episode where the Registrant of 90 years of age was home by himself with no family around. Early in October, our center had a phone call from the hospital stating that he was admitted to the hospital due to fracture of the lower extremities. According to home care aide he was found on the floor at home and was transported to hospital. He had his surgery and was transferred to rehabilitation center. I was able to communicate with him over the phone and he stated that with a closure of the center he lost his daily structure and routine. He stated that he became less active, depressed and felt socially isolated from his peers. (Highfield Gardens, Queens)*
- *Although some of our services are now being provided via telehealth, our Registrants do not receive assistance with blood sugar/blood pressure monitoring, physical and occupational therapy, recreation therapy, all of which are essential to their well-being. They report significant decline in physical functioning due to lack of physical activity; their mental health is suffering because they are isolated from their circle of people with whom they interacted on a daily basis prior to COVID-19. They no longer engage in cognitively stimulating activities and their memory is being affected by that. Please take into consideration that younger family members, for example their grand-children, do not visit their grandparents because of the risk of contamination as younger generation is more exposed to COVID and don't want it to affect their grandparents. This leads our Registrants to feeling isolated and alone in this difficult time of uncertainty. (Highfield Gardens, Queens)*
- *Mrs. M has been caring for her husband at home for quite some time now trying to keep him out of a nursing home. He is unable to walk and needs assistance*

*transferring out of his wheelchair for toileting and showers. She states she is not strong enough to help him bathe so she has been cleaning him up best she can. At program, he was receiving showers. He was also receiving PT and OT regularly, but his mobility has declined since our program has closed so she had to ask his MD to order this in the home. They recently had to purchase a sit to stand lift to help him transfer and now they are looking at getting him a Hoyer lift. She has had difficulty getting aide service to help her at home due to a lack of aides available in the community. . . . She states that she also has to help her adult son with issues and she is overwhelmed with all of it. She is older and is concerned about getting hurt trying to help her husband. (Loretto, Syracuse)*

- *Richard came to Golden Days several years ago after failing at other programs due to unexplained outbursts that frightened others and repeated falls. Richard lived for years with constant seizures until having a partial lobotomy so that he could function. This did slow the seizures but came with many added side effects including terrifying hallucinations and increase in OCD that leads to severe isolation. When Richard came to us he would sit by himself, not talk to anyone, and spend his day drawing. He was embarrassed about his drawings but everyone in the program loved them. He started making drawings every day and giving them to members of Golden Days. . . . Richard's social skills and confidence were improving greatly, as was his speech and ability to share his thoughts. Richard lives alone with aide assistance. . . . Richard is completely isolated outside of the paid aides that come to his home. For months he hasn't left home and according to his sister is regressing considerably. His language ability has decreased, he is becoming more fearful of places he had been accessing prior, and he is not motivated to engage with his art because there is no one with whom to share it. It took almost a year for Richard to identify people in program as friends, to have conversations even if it took a long time to get out what he wanted to say. He hasn't seen a friend in months, he has had repeated falls due to lack of exercise and movement, he is becoming afraid to leave his house. He asks his sister when we are going to open every time they talk. (Golden Days, Johnson City)*

As these testimonials demonstrate, ADHC programs provide invaluable services that safeguard and promote the physical, emotional and mental wellbeing of their registrants. Without ADHC programs, registrants are at risk of ending up hospitalized or in nursing homes.

### III.

#### **The Suspension Order is Susceptible to Legal Challenge**

The Suspension Order is susceptible to legal challenge on multiple grounds, including, but not limited to, the following:

*First*, DOH lacks statutory authority to single out and shutdown an entire industry for an indefinite period, as it has done to ADHC programs statewide. Likewise, no statute confers on DOH unbridled power to suspend transportation to and attendance at ADHC

programs. The absence of such statutes calls into question the legality of the Suspension Order.

Core separation-of-power principles dictate that an administrative agency can act only within the scope of its legislatively delegated authority.<sup>8</sup> As a creature of statute, an agency possesses only “those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.”<sup>9</sup> Only the Legislature, therefore, can authorize an agency to promulgate rules or regulations.<sup>10</sup> A corollary of this principle is that “[a]n agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature . . . .”<sup>11</sup> “Such action would be tantamount to legislation by administrative fiat”<sup>12</sup> and “in contravention of the separation of powers doctrine.”<sup>13</sup> Similarly, courts have “routinely” invalidated “executive orders imposing a substantial burden or restraint and lacking sufficient legislative authority . . . .”<sup>14</sup>

Given the absence of any statutory authority for DOH to act as it has vis-à-vis ADHC programs, the agency presumably relies on Executive Order 202.5. However, the Legislature never delegated to the Governor the power to suspend ADHC programs indefinitely, let alone empower him to delegate such an extraordinary, unchecked power to DOH. Only the Legislature may delegate rulemaking power to an administrative agency, and any such delegation must limit the field in which discretion is to operate and provide standards to govern its exercise.<sup>15</sup> Thus, even the Legislature cannot confer upon DOH the unrestricted authority to make broad policy decisions that Executive Order 202.5 purports to do.

*Second*, the Suspension Order and Executive Order 202.5 may violate the separation of powers doctrine enunciated in *Matter of Boreali v. Axelrod*.<sup>16</sup> There, the Court of Appeals

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<sup>8</sup> See *Nicholas v. Kahn*, 47 N.Y.2d 24, 30 (1979) (separation of powers doctrine prohibits administrative action absent legislative delegation of power to so act).

<sup>9</sup> *Matter of Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 221 (2017) (internal quotation marks & citations omitted).

<sup>10</sup> See *Rotunno v. City of Rochester*, 120 A.D.2d 160, 163 (4th Dep't 1986) (“[A]n administrative agency has no authority to create rules and regulations without statutory predicate, express or implied.”), *aff'd* 71 N.Y.2d 995 (1988).

<sup>11</sup> *Matter of Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989).

<sup>12</sup> *Matter of Bates v. Toia*, 45 N.Y.2d 460, 464 (1978) (citations omitted).

<sup>13</sup> *Nicholas v. Kahn*, 47 N.Y.2d at 30 (citations omitted).

<sup>14</sup> *Rudder v. Pataki*, 246 A.D.2d 183, 192 (3d Dep't 1998) (Mercure, J., dissenting), *aff'd*, 93 N.Y.2d 273 (1999).

<sup>15</sup> See *Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978) (“[T]he Legislature is powerless to delegate the legislative function unless it provides adequate standards.”) (citation omitted).

<sup>16</sup> 71 N.Y.2d 1 (1987).

identified the “coalescing circumstances” that, taken together, demonstrate an agency crossed the line between “administrative rule-making and legislative policy-making.”<sup>17</sup> These “coalescing circumstances” are present here. It is undisputed and undisputable that the Suspension Order and Executive Order 202.5 were crafted by the Executive Branch based on its own idea of sound public policy, without the benefit of a scintilla of legislative guidance. This turns on its head the bedrock constitutional principle that the Legislature makes the law and the Executive executes it.

*Third*, the Suspension Order is subject to challenge as an unconstitutional mandate.<sup>18</sup> Article I, Section 6 of the New York State Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.”<sup>19</sup> The Fourteenth Amendment to the United States Constitution likewise provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]<sup>20</sup>

Both constitutional provisions provide procedural and substantive due process protections to ADHC programs. “An essential principle of due process is that a deprivation . . . ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”<sup>21</sup> The “root requirement” of due process is that a person “be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”<sup>22</sup>

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<sup>17</sup> *Id.* at 11.

<sup>18</sup> The suspension also violates the Commerce Clause. The U.S. Constitution provides that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, sec. 8, cl. 3. Therefore, states are prohibited from passing legislation which excessively burdens interstate commerce. By instituting the suspension, both the Governor and the Commissioner are violating the Commerce Clause because they are infringing upon the rights of individuals to operate their businesses.

<sup>19</sup> N.Y. Const. art. I, § 6.

<sup>20</sup> U.S. Const. amend. XIV, § 1.

<sup>21</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

<sup>22</sup> *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); see also *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (explaining that the Constitution usually “requires some kind of a hearing before the State deprives a person of liberty or property”); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972) (stating that “deprivation of a protected interest need not be preceded by opportunity for some kind of hearing” only in “rare and extraordinary situations”); *People v. David W.*, 95 N.Y.2d 130, 138 (2000) (bedrock of due process is notice and opportunity to be heard before a determination is made to deprive a party of its protected rights).

Additionally, although administrative agencies may invoke the police power to protect the public,<sup>23</sup> they cannot infringe upon the right of an individual “to pursue a lawful calling in a proper manner, or . . . deprive a person of his property . . . unless [such] infringement and deprivation are reasonably necessary for the common welfare.”<sup>24</sup>

Here, no ADHC program has been given an opportunity to formally contest the Suspension Order or be heard on why it can operate without exposing individuals to COVID-19. The Suspension Order applies across the board, with no regard or consideration to a program’s size, proximity to COVID-19 hot spots, policies for maintaining social distancing, or practices for disinfecting its space. Similarly, the Suspension Order, in all respects, cannot fairly be said to be “reasonably necessary for the common welfare.”<sup>25</sup> There is no functional difference between ADHC programs (which DOH has closed)<sup>26</sup> and SADS programs (which DOH permits to operate).<sup>27</sup> So, too, the fact that private businesses, even gyms, have been allowed to reopen and provide in-person services answers any suggestion by DOH that all in-person ADHC programs, without regard to specific facts and circumstances, pose a public health threat to registrants.

*Fourth*, DOH’s Suspension Order may also constitute a violation of ADHC’s rights to constitutional equal protection. Article I, § 11 of the New York State Constitution provides that “[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof.”<sup>28</sup> Similarly, under the Fourteenth Amendment of the U.S. Constitution, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>29</sup> The purpose of the equal protection clauses is to “secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”<sup>30</sup>

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<sup>23</sup> *N.Y.C. Health & Hosp. Corp. v. Council of the City of N.Y.*, 303 A.D.2d 69, 74 (1st Dep’t 2003).

<sup>24</sup> *People v. Gillson*, 109 N.Y. 389, 400 (1888); see also *Defiance Milk Prod. Co. v. DuMond*, 309 N.Y. 537, 541 (1956) (same).

<sup>25</sup> *Id.*

<sup>26</sup> ADHC is defined as “the health care services and activities provided to a group of registrants with functional impairments to maintain their health status and enable them to remain in the community.” 10 N.Y.C.R.R. § 425.1.

<sup>27</sup> SADS are defined as “a structured, comprehensive program which provides functionally impaired individuals with socialization; supervision and monitoring; personal care; and nutrition in a protective setting during any part of the day, but for less than a 24-hour period. Additional services may include and are not limited to maintenance and enhancement of daily living skills, transportation, caregiver assistance, and case coordination and assistance.” 9 N.Y.C.R.R. § 6654.20.

<sup>28</sup> N.Y. Const. art. I, § 11.

<sup>29</sup> U.S. Const. amend. XIV, § I.

<sup>30</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotation marks and citations omitted).



Here, DOH has never provided an explanation to the Council as to why ADHC programs should be treated differently than other similarly-situated entities which currently are providing services in person, such as SADS, PACE<sup>31</sup> and OPWDD Day Services.<sup>32</sup> Although all of these programs treat similar populations and provide similar services, only ADHC programs currently have been suspended. In fact, DOH has issued COVID-19 guidance for the other programs, to minimize the spread of the virus.

Thus, the Suspension Order has created an absurd result, where an individual may attend an in-person game of bingo at an SADS program but may not receive medically-necessary services at an ADHC program. DOH can point to no empirical data — because none exists — suggesting that in-person ADHC programs would spread COVID-19 at a higher rate than other programs. Nor can DOH justify why SADS programs, PACE and OPWDD Day Services may provide in-person services, but ADHC programs cannot.

*Fifth*, the Suspension Order is subject to challenge as arbitrary and capricious, and an abuse of discretion. It is a bedrock principle of administrative law that an agency action must be struck down if it lacks a rational basis, or is unreasonable, arbitrary and capricious.<sup>33</sup> Agency action that lack an evidentiary basis is arbitrary and capricious as a matter of law.<sup>34</sup> Such appears to be the case here.

The arbitrary nature of the Suspension Order is evidenced by the fact that DOH has never produced any justification for it, while at the same time permitting numerous other types of in-person health care programs to operate. Moreover, the Suspension Order is a blunderbuss instrument, shutting down all ADHC programs without regard to what protocols each program has in place and whether they are located in or near a COVID-19 hot spot. By treating all ADHC programs the same, despite their differences, the decision to shut them down lacks rational basis. In short, DOH has not and cannot produce any evidence to support its devastating decision to suspend ADHC programs in definitely.

Accordingly, ADHC programs should be allowed to reopen, subject to thoughtful and carefully tailored restriction to protect against the spread of COVID-19.

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<sup>31</sup> A PACE organization provides a comprehensive system of health care services for members age 55 and older who are otherwise eligible for nursing home admission.

<sup>32</sup> OPWDD Day Services are a range of programs available to individuals with developmental disabilities, focused on giving participants the personal, social and vocational supports needed to live in their community.

<sup>33</sup> *N.Y. State Ass'n of Ctys. v. Axelrod*, 78 N.Y.2d 158, 168 (1991).


<sup>34</sup> See, e.g., *Matter of Jewish Mem'l Hosp. v. Whalen*, 47 N.Y.2d 331, 343 (1979) (invalidating 10% reduction in the amount hospitals were reimbursed for the services of interns and residents because DOH had conducted no studies and there was “no evidentiary basis in the present record” for such a reduction).

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December 21, 2020  
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Accordingly, for all the foregoing reasons, DOH should immediately lift the Suspension Order and issue its plan for reopening ADHC in-person programs.

Very truly yours,

GREENBERG TRAUIG, LLP



Henry M. Greenberg

HMG/JMG

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