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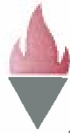

Empire Justice Center

Making the law work for all New Yorkers

Albany ◆ Rochester ◆ White Plains ◆ Long Island

Empire Justice Center Testimony

New York State Joint Legislative Hearing on The Executive Budget: Health

Sponsored by:
the Senate Finance Committee &
the Assembly Ways & Means Committee

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Good afternoon. My name is Cathy Roberts and I am a Senior Paralegal on Empire Justice Center's Health Law Team.

With offices in Rochester, Albany, White Plains and on Long Island, Empire Justice Center provides backup, training and support for the legal services programs across the state that represent low-income New Yorkers. We also undertake policy analysis, legislative and administrative advocacy, provide legal representation to low income New Yorkers on an individual basis and in select class actions to improve the way the law impacts those we serve. Empire Justice Center employs staff attorneys specializing in Health and Medicaid, public benefits, Supplemental Security Income (SSI) and Social Security Disability (SSD) benefits, education, public and subsidized housing, legal issues affecting low income immigrants and people living with HIV and AIDS, consumer law, domestic violence and civil rights among other areas.

In our Health Law Team's policy analysis, we look for trends in the problems faced by consumers in public health programs statewide, to identify opportunities for systemic improvements. We then work to make those changes possible through administrative and legislative advocacy, utilizing the courts and class-action litigation as a last resort.

From this health-consumer perspective, there is no question that the Governor's Health Budget moves New York State in the right direction:

1. The Budget avoids new cuts to consumer eligibility and services, and also stays the course against further cuts in provider rates, which can have significant impact on access.
2. It provides statutory authorization for a State Health Insurance Exchange, which will enable New York to put new enrollment systems in place and bring health insurance coverage within the reach of low-income working families.
3. The Budget also reflects a vision for state takeover of Medicaid program administration that will move toward a fully streamlined approach to public program eligibility determinations, integrated with the Exchange.

Empire Justice Center fully supports these critically important advances and applauds the Governor for his steadfast commitment to maximizing health coverage for all New Yorkers.

While there is much in the budget to praise, it is essential that we share with you our concerns about some of the cost savings initiatives included in the Executive Budget:

1. We remain very concerned about the rapid expansion of mandatory Medicaid managed care, especially Managed Long Term Care for dual eligibles.
    - We will urge you to negotiate more transparent monitoring of this initiative, which was put in place in last year's Budget and is further advanced this year.

2. We are also concerned about the service limits enacted in last year's Budget.
    - We support continued expansion of the restorations included in the Budget this year.

3. Similarly, last year's cuts to the EPIC program for seniors have resulted in huge increases in prescription drug costs for elderly households living on fixed budgets.
    - We urge you to consider alternative approaches in this year's Budget that would soften the blow for elderly New Yorkers.

4. Finally, we oppose the Budget's wholesale elimination of the spousal refusal provisions currently available to Medicaid applicants. While we understand the need to eliminate loop holes utilized by higher income applicants, we would urge that lower income couples retain the ability to use spousal refusal when applying for community Medicaid. Otherwise, the spousal budgeting protections in place for those applying for nursing home care result in a bias toward institutionalization, and will militate New York's efforts to ensure access to services in the community for those who need supports to avoid expensive and unwanted institutionalization.
    - We urge you to retain lower income couples' ability to use spousal refusal when applying for community Medicaid.

Further detail on all of the above points follows.

AUTHORIZATION FOR A STATE HEALTH INSURANCE EXCHANGE

Empire Justice enthusiastically supports the Executive Budget's proposal to authorize a State Health Insurance Exchange. The budget language holds true to the agreement reached between the Senate, Assembly and the Governor last session. It would establish the New York Health Benefit Exchange, provide for a series of policy studies, some of which are already in progress, and would require Legislative approval of action on the resulting recommendations.

It is critical that these basic statutory principles are enacted in this year's Budget in order for New York to comply with the timetable and requirements set out in the federal Affordable Care Act (ACA). If we do not take these basic steps now, New York may fail to meet the deadline for developing the support and infrastructure needed to launch a state Exchange that will meet the unique needs of New York residents. If that happens, under the terms of the ACA, a federally-operated Exchange will be established in the state by the U.S. Department of Health and Human Services, making it much less likely that the needs of New Yorkers will be taken into account.

Passage of legislation to establish a functioning Exchange is also imperative in order to ensure that New York State remains eligible for remaining federal funds. Unless we have statutory authority for our Exchange, we will be ineligible to apply for Level II funding by the deadline this June. Level II funding would extend well beyond the time remaining on our final Level I grant, and would fully fund the first year of Exchange operations.

STATE TAKEOVER OF MEDICAID ADMINISTRATION

Empire Justice Center participated in the Medicaid Redesign Team's Work Group on Streamlining and State and Local Responsibilities, and we recognize several of the proposals in the Health Budget as carrying forward the recommendations of this group. We fully support State assumption of increases in the cost of New York's Medicaid program. This is much needed relief for the counties, who have been forced to rely on local taxes to raise revenue for the program. We also support the phased-in state assumption of functional responsibilities for processing Medicaid applications.

We are particularly pleased to see that the Budget targets Medicaid recovery actions for state assumption. Low-income New Yorkers have struggled to respond to recovery actions instituted at the county level in response to variations in income that have resulted in eligibility changes. Income fluctuations are common for lower income families struggling to stay afloat. All too often the implications of these fluctuations on access to public health programs are not fully understood by the families, causing confusion and inadvertent exposure to recovery actions.

It is crucial that the process for recovering Medicaid payments made to health plans during times of ineligibility provides Medicaid recipients, and former Medicaid recipients, with a fair opportunity to understand and evaluate the payments that are being demanded and the options they have to respond.

- To ensure fairness, the Executive Budget's approach to centralizing and standardizing these actions must be accompanied by legislation ensuring notice and fair hearing rights for these actions.

We are also pleased to see and fully support the Budget proposal reflecting the Work Group's recommendation that elderly and disabled new Yorkers receive the same kind of enrollment assistance that is provided to non-elderly/disabled applicants for Medicaid.

This group of New Yorkers will not benefit from the eligibility streamlining and navigational assistance that the State Health Insurance Exchange promises for other low-income New Yorkers. Yet eligibility budgeting and enrollment choices are particularly complex for them. Many are required to navigate the various components of Medicare coverage as well as Medicaid. All will face mandatory enrollment into managed care, and for those targeted by the Managed Long Term Care initiative, significant issues regarding capacity and due process loom.

- Without additional assistance to these vulnerable elderly and disabled, their needs will far outpace available resources and many will be left adrift.

SERVICE LIMITS

Last year's Budget put severe restrictions on access to important services such as orthotic footwear and compression stockings with no process for individualized exceptions. We have clients with amputations and severe lymphedema who have lost the ability to ambulate because Medicaid has denied them access to these services. Their conditions will only worsen and Medicaid will ultimately pay for avoidable emergency admissions, surgeries and even institutionalizations.

Last year's Budget also limited access to physical therapy, occupational therapy and speech therapy. All of these limitations make it more difficult for individuals with disabilities to maintain or improve their functioning and result in deterioration and the need for higher levels of care.

- A process for overriding the cap where medically necessary must be enacted.

- Additionally, services provided in a hospital outpatient setting should be exempt from the cap. Medicare provides this exemption; adding this exemption to Medicaid will better align Medicaid with Medicare and provide another mechanism for individuals with disabilities and severe chronic conditions to obtain medically necessary therapy.

This year's Budget does restore access to nutritional therapy, but only for those with HIV. It also fails to create any exceptions to the limits on compression stockings and orthotic footwear. The Governor's proposal to restore Medicaid coverage of nutritional supplements for people with HIV should be expanded to allow the Commissioner of Health to set standards to provide these supplements to all of those who, because of chronic medical conditions are unable to chew or swallow regular food and rely on these supplements for adequate nutrition.

NURSING HOME BED HOLDS

Empire Justice opposes the proposal in this year's Budget to restrict bed hold payments to nursing homes. A similar change in last year's budget was rejected by the Center for Medicare and Medicaid Services.

If nursing homes are not reimbursed for bed holds, Medicaid consumers who may have lived in a nursing home for years, with established relationships and routines, are at risk of being forced to move to a different nursing home after a traumatic hospital stay. Ending bed hold payments deprives nursing home residents of the right to return to their beds after a temporary hospitalization or following a therapeutic leave, such as a stay with family for a holiday. For tens of thousands of seniors and people with disabilities, a nursing facility is their home. The right to return home after a temporary medical or therapeutic leave must be maintained.

- We urge the Legislature to restore the rule which had been in effect in New York for many years. The previous rule restricted bed hold payments to nursing homes with vacancy rates above a certain threshold. Such a rule protects Medicaid dollars by ensuring that payment is made only if truly necessary to hold the bed, while retaining the right elderly and disabled nursing home residents have to return home.

PHARMACY SERVICES

Empire Justice Center enthusiastically supports the Article VII provision incorporating improved language access protections for pharmacy consumers with Limited English Proficiency (LEP). We are grateful for the Assembly and Senate's leadership on this issue and were pleased to see that the important protections outlined in last year's Safe RX legislation made it into this year's Executive Budget. Offering translation and interpretation of prescription information and warning labels to LEP individuals who use chain or mail order pharmacies should help ensure medication adherence and improve health outcomes for this population.

We also want to register our concern about several other pharmacy proposals. First, the Executive Budget includes a proposal to allow DOH to override a prescriber's medical necessity determination for Medicaid Fee For Service (FFS) recipients taking multiple opioid prescriptions in an outpatient setting. We are concerned that this proposal may have unintended consequences for people with incurable or progressively worsening medical conditions who rely on 5 or more opioids and other medications to keep intractable pain at bay, and to stay out of a hospital or nursing home setting. This may be a small percentage of the multiple opioid user population but they are perhaps among the most vulnerable of all Medicaid recipients.

- Additional protections should be built into any final legislation to make sure that these individuals don't wind up in emergency rooms or hospitals because they are unable to access medically necessary opioids.

Finally, we want to speak to the Budget's failure to restore any of the cuts to the Elderly Pharmaceutical Insurance Coverage (EPIC) Program. These cuts were put in place in last year's budget and have had a grave impact on seniors across New York State. Despite DOH's outreach campaign to educate EPIC members about the changes, many EPIC seniors were caught completely off-guard. Local HIICAP (Health Insurance, Information, Counseling and Assistance) counselors, senior service providers and pharmacists all over New York are encountering seniors who are having difficulty accessing their prescriptions due to the EPIC changes that went into effect on January 1, 2012.[1] The most alarming cases involve seniors taking very

[1] http://www.theithacajournal.com/article/20120205/NEWS01/202050331/Seniors-struggling-financially-after-prescription-drug-program-changes?odyssey=tab%7Ctopnews%7Ctext%7CFRONTPAGE ; http://palltimes.com/articles/2012/02/01/news/doc4f25d7f9bf140628965130.txt; http://www.wcax.com/story/16654743/new-cuts-force-ny-seniors-to-pay-more-for-medications; http://www.syracuse.com/news/index.ssf/2012/01/epic_program_cuts_make_prescri.html; http://pressrepublican.com/0100_news/x1061610843/Major-cuts-to-prescription-drug-coverage-affect-states-elderly; http://www.dailygazette.com/news/2012/jan/01/0101_drug/?print.

expensive costly drugs to treat conditions like cancer, multiple sclerosis and rheumatoid arthritis, who have seen their co-pays rise from $20 to hundreds of dollars per drug.

The good news is that we are finding that many of these individuals can access the Part D Extra Help program via the Medicare Savings Program (MSP) or Medicaid spend down. Previously, EPIC was not able to spot these individuals as being Low Income Subsidy (LIS) eligible – they appear to be over income but they have monthly insurance premiums or other medical costs that reduce their income below MSP or Medicaid income limits, which gets them into Extra Help. EPIC had been covering their drugs last year instead of Extra Help. While advocates and HIICAPs are helping these seniors access LIS now, they need time and assistance with the application process and they can't afford their drugs in the interim. Other seniors who aren't eligible for LIS are now being forced to drain their savings to pay for life saving drugs. Others are simply not taking their drugs.

Empire Justice Center urges the Legislature and the Governor to take concrete steps to address this public health crisis. We recommend:

- Providing expanded protections along with a more aggressive maximization component of the federal Low Income Subsidy to benefit both the EPIC seniors and save the program money.

- Reinstating some level of co-pay cap protection and coverage of Part D excluded drugs.

- Expanding Medicare Savings Program income limits, even on a modest scale, to further maximize Extra Help enrollment and provide badly needed assistance to our needy seniors and disabled Medicare recipients.

We welcome the opportunity to discuss these and other alternatives in more detail with legislative and DOH staff.

FAIR HEARING INVESTMENTS

We strongly support the Executive Budget proposal to invest additional resources in the fair hearing process. It is vital that New York maintain adequate due process protections for Medicaid consumers transitioning into managed long term care or other coordinated care models. We agree that providers should receive notices of fair hearing requests, that ongoing training of Administrative Law Judges should be provided, and that consumers should have input and access to the training.

MEDICAID DISPROPORTIONATE SHARE FUNDING

The Executive Budget proposes an adjustment to the distribution formula for part of Medicaid's Disproportionate Share Hospital (DSH) funding, to target funding distributed

through the Office of Mental Health to hospitals that provide high volumes of Medicaid and uncompensated care.

This adjustment does not go far enough. All of New York's uncompensated care funding must be better targeted to hospitals that are not only providing uncompensated care, but are also providing uninsured patients with financial assistance to help them pay hospital bills. We have found that, despite passage of the Hospital Financial Assistance Law in 2006, families with serious medical needs are still unable to access financial assistance for medically necessary treatment in advance of an emergency at almost half of the hospitals on Long Island. Our findings will be published later this month and are consistent with patient advocate reports that analyze how financial assistance aligns with DSH funding distributions. DSH funds are currently not targeted appropriately and are not providing sufficient incentive to hospitals to provide financial assistance to uninsured patients. This must change.

The Medicaid Redesign Team's Payment Reform Work Group recommended that a new Committee be convened to recommend further reforms. This group should take up its charge immediately so that reforms can be made in this year's budget. If New York does not do a better job of targeting DSH funds to the hospitals truly providing uncompensated care, and do it quickly, we will put future federal funding at serious risk.

MANAGED LONG TERM CARE

Last year's enacted Health Budget authorized the State Health Department to mandate enrollment in Managed Long Term Care for elderly and disabled New Yorkers eligible for both Medicaid and Medicare (dual eligibles). This action requires federal approval, which is still pending. This year's Executive Budget appears to advance New York's capacity for a mandatory Managed Long Term Care program by opening the provider certification process to a wider range of applicants.

While we understand the need to better coordinate care for dual eligibles, we are concerned about mandating their enrollment into Managed Long Term Care for several reasons. First, capitation arrangements offer the incentive to reduce services. We fear that new enrollees will see reductions in the hours or personal care or home health aides. Many of the plans, including those that will be encouraged to apply under this year's budget, are only partially capitated, which means that they will not be responsible for care other than home care. We fear this approach will leave vulnerable consumers facing a fragmented service world, with no coordination between services obtained in the Fee For Service arena and their plan's managed home care services.

Second, the Department of Health has indicated that plans will be allowed to do their own assessments of need, and no standard tool has been made available or required. We fear that plans will not utilize a standard approach, and that consumers will have a difficult time understanding the processes or comparing the potential differences among the plan's approaches.

Third, the Department of Health has indicated that not all of the regulations and case law that govern need assessments and actions to reduce services will be applicable to the plans. Consumers will be required to navigate a different set of notice and appeal rules, which is likely to be less protective of their rights. One example is that the Department will not require plans to provide services pending a fair hearing that is requested after a consumer receives notice of a reduction in services. Currently, this protection, known as "aid continuing" allows consumers to maintain critical services in the community while contesting a reduction.

We urge the Legislature to require systematic and transparent monitoring of the mandatory Managed Long Term Care program, and ensure adequate due process when services are reduced.

- Plans should be required to report data reflecting changes in the level of services new enrollees receive and changes that members receive over time.
- Plans should also be required to report on their utilization of promising new coordination models that would reach beyond partial capitation, such as health homes.
- Data measures from cost reports and quality assurance reports should be summarized in a manner that makes plan comparisons possible for consumers and their advocates, and be publicized on the Department's website.
- The Department should summarize the data and reports they receive for plans in quarterly presentations to the Legislature and the Medicaid Managed Care Advisory Review Panel (MMCARP), which was charged with overseeing the implementation of Managed Long Term Care in last year's budget.
- Finally, existing requirements for notices and fair hearings, including aid continuing, should be made applicable to the plans.

Thank you for the opportunity to testify here today, and for your continued commitment to Medicaid Redesign and health reform in New York State.