New York Legal Assistance Group

Testimony to the New York State Legislature Joint Hearing of the Senate Finance and Assembly Ways and Means Committees

THE 2021-2022 EXECUTIVE BUDGET

TOPIC: HEALTH/MEDICAID

Submitted by
Valerie Bogart, Esq.
Director, Evelyn Frank Legal Resources Program
New York Legal Assistance Group
100 Pearl Street, 19th floor
New York, NY 10004
Direct Dial 212.613.5047
vbogart@nylag.org

February 25, 2021

New York Legal Assistance Group (NYLAG) uses the power of the law to help New Yorkers experiencing poverty or in crisis combat economic, racial, and social injustice. We address emerging and urgent needs with comprehensive, free civil legal services, financial empowerment, impact litigation, policy advocacy, and community partnerships. We aim to disrupt systemic racism by serving clients, whose legal and financial crises are often rooted in racial inequality.

I. Medicaid: Repeal the Global Cap to Minimize Harmful Cuts (A.226)

The Global Cap was enacted as one of the original Medicaid Redesign Team recommendations in 2011. This cap imposes on New York State the same constraints that federal block grants would impose – which Republicans in Congress could not push through even when they had a majority. Like block grants, the Global Cap forces New York to manage the Medicaid program within a fixed cap regardless of increased need and costs, with the surge in need for Medicaid caused by COVID-19 as the classic example of the need for flexibility. New York is proud of embracing the Medicaid expansion under the ACA and of its commitment to providing services for people with disabilities to live at home rather than in nursing homes. The Global Cap should be repealed to allow for enrollment growth, increased demand for services and costs due to COVID-19 – without paying the price of forcing harsh, arbitrary cuts to keep costs under the artificial Global Cap.

II. Expand Health Coverage for Immigrants

NYLAG supports the Coverage4All campaign, calling for access to affordable health coverage for all New Yorkers, regardless of immigration status. Short of that, this year's budget should include $13 million to provide temporary Essential Plan coverage for people with incomes up to 200% of the federal poverty level who have had COVID-19 and are excluded from existing coverage programs because of their immigration status.

III. Support Creation of Medical Respite Pilot Program

NYLAG supports the proposed creation of medical respite programs to provide care to homeless patients who are too sick to be on the street or in a traditional shelter, but not sick enough to warrant inpatient hospitalization. NYLAG has long sought solutions for this vulnerable population who without respite are unable to access much needed treatment due to the instability of their homelessness, or forced into unnecessarily prolonged hospital stays where they are at risk for hospital-born infections or unable to adhere to treatment protocols. Medical respite provides temporary room and board and the arrangement of health care and support services in order to improve the health of medically impacted homeless individuals while also decreasing costly hospital use. Programs in New York and around the country have a proven successful and are useful models for replication.

NYLAG Client Example: Presenting to the ER, Demetrius was severely jaundiced and admitted to the hospital. He was diagnosed with Stage 3 pancreatic cancer. When he was stabilized and discharge-ready, the hospital could not safely discharge him to a congregate men's shelter because his cancer treatment rendered him immune-compromised. Without medical respite placement, Demetrius' hospitalization stretched three months beyond his discharge ready date. Unfortunately, he was unable to receive maximum dose chemotherapy for his cancer during this time because he would have been too susceptible to hospital-born infections.

IV. Eliminate Institutional Bias and Support Home & Community Based Services (HCBS)

-- continued –

IV. Eliminate Institutional Bias and Support Home Care & Other HCBS Services

A. Repeal the MRT II Cuts that Reduce Access to Medicaid Home Care

a. Repeal or Amend the Minimum "Activity of Daily Living" (ADL) Threshold for Personal Care and CDPAP Eligibility

The FY 20-21 Budget restricted eligibility for Personal care services (PCS), Consumer-Directed program services (CDPAP) and Managed Long Term Care (MLTC) plans. An applicant must need assistance with *physical maneuvering* for more than two Activities of Daily Living (ADL*s*). The sole exception is for those with dementia or Alzheimer's disease, who must need *supervision* with more than one ADL. These new limits violate the "comparability" requirements of the federal Medicaid law, which prohibit discrimination based on diagnosis. 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. § 440.240(b). They also jeopardize New York's receipt of hundreds of millions of dollars under the Community First Choice Option (CFCO), which forbids discrimination on diagnosis and requires provision of supervision and cueing assistance as well as hands-on physical assistance.

Consumers who have vision impairments, traumatic brain injury (TBI), developmental disabilities (DD), and other cognitive, neurological or psychiatric impairments often need *supervision* but *not physical maneuvering* with ADL*s*. Denying them PCS or CDPAP solely because they are not diagnosed with dementia or Alzheimer's disease – even though they have the same need for assistance -- violates the federal Medicaid law and regulations.

The State Department of Health wrongly claims that people with TBI's or Developmental Disabilities have their needs met through the TBI or OPWDD waivers. However, TBI and OPWDD waiver participants rely on PCS and CDPAP services under the State Medicaid plan for their core daily needs. Special waiver services like Respite, Residential Habilitation, Day Habilitation, and Community Habilitation supplement but do not replace the essential daily care needs met by PCS or CDPAP.

> **EXAMPLE**: Sam, age 22, is autistic and has an intellectual disability. He lives with his parents and a sibling who also has a developmental disability. Sam is enrolled in the OPWDD waiver through which he receives some supplemental waiver services. However, his main daily care is provided through 84 hours/week of CDPAP services. Since most of the assistance with ADLs he needs is "supervisory," he could be denied CDPAP services under the new restrictions and be forced into an institution.

We urge full repeal of the ADL limits rather than the approach taken in A.4309. That bill extends the "dementia exception" – which requires only supervision with two ADLs rather than "physical maneuvering" assistance with three ADLs – to vision impairments, DD, TBI and other cognitive impairments. While this is helpful, it is impossible to list every diagnosis for which on would need supervisory rather than physical assistance with an ADL. For example, consumers at early stages of Parkinson's disease or multiple sclerosis may need supervisory rather than "physical maneuvering" assistance with ADLs. Only repeal of this standard can prevent discrimination against people with an endless list of diagnoses.

b. Restore the "Housekeeping" Program – that Prevents Falls and Other Accidents by Providing up to Eight Hours/Week of Personal Care

The legislature is probably not even aware that this longtime preventative service was repealed last year, because the law authorizing it remains on the books. SSL § 365-a, subd. 2(e)(iv). By enacting the new ADL restrictions above, the "Housekeeping" service, also known as "Level 1" personal care, was indirectly abolished. This service is solely for people who are independent with ADLs but need assistance with "Instrumental ADLs" – chores like

laundry, grocery shopping, cleaning, meal preparation. Since personal care is now limited to people who meet the minimum ADL criteria, the housekeeping program is abolished.

This program is cost-effective. By investing in just 8 hours per week to prevent falls and other accidents, Medicaid prevents accidents, hospital stays and nursing home placement, or costly 24/7 home care– at much higher cost to the State. Seniors denied this service will face growing wait-lists for EISEP services. Younger people with disabilities are not eligible for EISEP and will be left with no services.

c. Repeal the new Battery of Assessments Enacted in FY 20-21 That will Delay Provision of Medicaid Home Care

By adding two more assessments to the already cumbersome home care assessment process, access to Medicaid personal care and CDPAP services will be greatly delayed. These delays will hurt new people enrolling in MLTC plans or seeking services through their local district or Medicaid managed care plan. They will also hurt people already receiving services from an MLTC or managed care plan who request an increase in services because of their deteriorating condition or a new medical diagnosis. Though federal regulations require MLTC and other managed care plans to authorize services in 14 days, and in just 3 days in crisis situations, the State's new battery of assessments will take months to complete before the local district or plan can authorize services.

d. Repeal the 30-month lookback and transfer penalty enacted last year

The lookback and transfer penalty enacted in FY 2021 has not yet been implemented because of the federal "maintenance of effort" requirements under the COVID Families First law. Once implemented, this change will cause huge delays for those seeking Medicaid home care or assisted living services – and could force them into nursing homes. The system will be hugely burdensome for local districts that are already strapped with COVID-19 pressures and logistical problems. The cost of implementing this burdensome system will be more than any savings from imposing "transfer penalties" on the few applicants who have transferred assets. The harm of delay will hit every applicant – the truly poor who never had any assets to transfer will suffer because of the few who may have transferred some assets.

e. Take Steps to Ensure that People Temporarily in Nursing Homes can Return to the Community

Since August 2020, nearly 20,000 Medicaid recipients have been disenrolled from Managed Long Term Care plans because they have been in nursing homes for more than 3 months. These mass disenrollments implemented a change enacted in the FY 2018-19 Budget that "carves out" long term nursing home care from the MLTC benefit package and excludes long-term nursing home residents from MLTC plans. The 20,000 people disenrolled from MLTC plans are assumed to be permanently placed in a nursing home. However, this assumption is wrong for an unknown number of consumers who fully intend to return to their homes. But being ejected from their MLTC plans will make it extremely difficult to obtain the home care services needed to return home. We recommend these steps to remove obstacles that prevent consumers from returning home from temporary nursing home stays:

1. **Require the Commissioner to send notices to MLTC members who are in nursing homes early in their nursing home stay that they will be disenrolled after 3 months,** if they do not have an active discharge plan in place. This should be in addition to the Notice of Disenrollment sent 10 days prior to their disenrollment, which is the only notice they receive now.
    i. **Both the early Notice and the Notice of Disenrollment should** be sent to the consumer's "designated representative," usually a family

member designated as their representative to the nursing home and/or MLTC plan. Now, the notices are sent only to the nursing home resident. With families unable to visit during COVID-19, the consumer has no help to appeal these notices as needed to express their desire to return home.

2. **Nursing home residents who indicated a desire to return home on the quarterly Medical Data Set (MDS) should not be disenrolled from the MLTC plan.**

3. **Expand the "Special Income Standard for Housing Expenses" that Makes it Possible for People to Pay Rent when Leaving a Nursing Home or Adult Home** - Amend Social Service Law 366, subd. 14 so that consumers who arrange for "Immediate Need" personal care or CDPAP services in order to leave a nursing home or adult home can keep enough of their income to pay rent. Now that long term nursing home care is carved out of MLTC, it doesn't make sense to limit this benefit to those who enroll in MLTC directly from a nursing home.

4. **Require Nursing Homes to help consumers in temporary stays keep their SSI and Social Security benefits so that they can pay their rent to maintain their home.** To keep SSI going for 3 months while in a nursing home**,** the nursing home must file a form with the local SSA office signed by a doctor, stating that they expect to return home in 90 days. See http://www.wnylc.com/health/download/594/. Similarly, temporary nursing home residents with Social Security or pension income may only keep a personal allowance of $50/month unless the nursing home files a Medicaid form confirming their reasonable expectation to return home. This allows the consumer to keep the same amount of income that Medicaid allows in the community. See http://www.wnylc.com/health/download/711/. Nursing homes rarely help with these forms – leaving consumers unable to pay rent and in danger of losing their homes.

5. **Change Policies and Procedures to ensure that any MLTC Member who was disenrolled because of long-term nursing home stay can quickly re-enroll in MLTC when ready to go home.** Now, nursing homes have some disincentive that discourages them from filing the needed Medicaid forms to change the eligibility code so that the resident can enroll in a plan. MLTC plans must be required to accept consumers who want to re-enroll.

B. ADDRESS THE CRITICAL SHORTAGE OF HOME CARE WORKERS

a. Reject the Executive's proposed reduction in workforce recruitment and retention funding for home care workers across many programs

b. Include the "Fair Pay for Home Care Act" in the Budget

In July 2021 the $15 minimum wage goes into effect in NYS for fast food workers – while they need and deserve it, this will drain the home care worker pool, which has already shrunk with low wages. #FairPay4HomeCare will ensure that home care workers are paid 150% of the minimum wage, lifting these crucial frontline workers out of poverty, many of whom are women of color. Mercer consulting estimates that the current shortage of 20,000 home care workers in NYS will grow to over 83,000 home care workers by 2025 without action today. In many counties and even in New York City, which normally does not see worker shortages -- new home care cases cannot be opened or people cannot receive the hours that they are

approved for. We have seen seniors and people with disabilities forced into nursing home because they cannot get services in the community.

Improve Nursing Home and Adult Care Facility Resident Care and Life: Take Intentional Action

NYLAG supports increased oversight of the business dealings and operations of nursing homes. This includes enactment of a minimum Medical Loss Ratio, tying Medicaid funding (and any increase in Medicaid funding) directly to resident care, and legislation that increases oversight on nursing home contracts, ownership changes and sales.

NYLAG strongly supports **minimum staffing standards** in nursing homes. the average amount of total care hours provided in New York's nursing facilities in the second quarter of 2020 was only **3.51 hours per day** – ranking 28th out of all 50 states despite the high payment rates for nursing homes in NYS.[1] This level of care is less than what has been federally recommended in nursing facilities (at least 4.1 hours of total care, including .75 RN care – a level that can still be provided in the community).

NYLAG also urges the legislature to:

1. Increase penalties for violations of Public Health Law and Invest in nursing home resident care.
2. Increase funding to the NYS Long Term Care Ombudsman Program, which is grossly underfunded compared to other states
3. Expand the Open Doors Transitional Support Program
4. Promote alternative models of long-term care facility care
5. Reject the Executive Budget cuts to the EQUAL Program and Adult Home Advocacy Program
6. Increase civil penalties for Adult Care Facility (ACF) violations and invest in ACF residents

Thank you for the opportunity to submit this testimony. Please feel free to contact me with any questions.

For more information:

Valerie J. Bogart, Director
Evelyn Frank Legal Resources Program
New York Legal Assistance Group
7 Hanover Square, 18th Floor
New York, NY 10004
tel 212.613.5047 fax 212.714.7450
vbogart@nylag.org
http://nyhealthaccess.org

[1] Based on federal MDS data, available at https://nursinghome411.org/staffing-q2-2020/.