THE LEGAL AID SOCIETY

49 Thomas Street
New York, NY 10013
(212) 577-3300
https://www.legalaidnyc.org

Testimony of The Legal Aid Society
Joint Legislative Public Hearing on 2024-25 Executive Budget Proposal: Health

January 23, 2024

Thank you to the Assembly Ways and Means Committee and Senate Finance Committee for the opportunity to provide testimony on the 2024-25 Executive Budget. The Legal Aid Society is a private, not-for-profit legal services organization, the oldest and largest in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of poverty. The Legal Aid Society's Health Law Unit (HLU) provides direct legal services to low-income health care consumers from all five boroughs of New York City. The HLU operates a statewide helpline and assists clients and advocates with a broad range of health-related issues. We also participate in city, state, and federal advocacy efforts on a variety of health law and policy matters.

Over the last four years, the COVID-19 pandemic has highlighted and exacerbated the stark racial disparities in our health care system, and The Legal Aid Society's client communities have been disproportionately harmed by the health and financial impacts of COVID. In the past year, the unwind of Medicaid continuous coverage provisions has put unprecedented strain on the Medicaid program, Medicaid recipients, and the advocates who help them. We applaud the Department of Health for its efforts to minimize coverage loss, including securing impactful waivers from the Centers for Medicare and Medicaid services. Unfortunately, even with these additional protections, many New Yorkers have lost coverage this year, and this will continue as the unwind continues throughout 2024, making consumer protections and supports particularly important. We look forward to working with the Legislature towards a final budget that strives for an equitable health care system for all New Yorkers and make the following recommendations to that end.

Extend Public Health Insurance to All New Yorkers, Regardless of Immigration Status

The recent implementation of Medicaid eligibility for individuals 65+ regardless of immigration status has provided a crucial safety net for vulnerable New Yorkers. However, we are disappointed that the 1332 waiver does not include an extension of coverage through the Essential Plan to other undocumented New Yorkers. We urge the Legislature to allow immigrants to access affordable health care by using the remaining 1332 surplus pass-through funds to cover the cost of expanding the Essential Plan to include 150,000 immigrants.

Strengthen Consumer Protections and Reduce Medicaid Debt

The Legal Aid Society supports many of the consumer protection proposals in the Executive Budget. Protecting New Yorkers from the devastating impacts of medical debt is essential to meaningfully address the health equity gap. The Health Law Unit represents numerous clients

facing crushing medical debt. Although some of these clients lack health insurance, many of them are insured. Limits of private insurance coverage, accumulations of Medicare coinsurance, and violations of Medicaid billing protections all result in medical debt for individuals with insurance.

We applaud the Governor's efforts to improve the Hospital Financial Assistance Law (HFAL), and we urge the Legislature to support these changes as well as additional reforms to the HFAL based on the Ounce of Prevention Act (S.1366B/A.6027A). We support the provisions in the Executive Budget to:

- increase the income eligibility for hospital financial assistance
- cap monthly payment plans at 5% of a patient's annual gross income
- eliminate the HFAL's asset test which only applies to low-income patients
- allow patents to apply for hospital financial assistance at any time during the collection process instead of being subjected to a 90-day time limit
- require hospitals to report the race, ethnicity, gender, age, and insurance status of patients who apply for, receive, and are denied financial assistance
- require hospitals to notify patients about hospital financial assistance during intake, registration, and discharge.

We also encourage the Legislature to incorporate provisions from the Ounce of Prevention Act, including applying the HFAL to all New York State Hospitals, time-limiting debt repayment plans, and requiring all providers at a hospital to follow the hospital's HFA policy, not only those employed by the hospital.

The Legal Aid Society strongly supports the Governor's proposal to prohibit hospitals from suing patients with incomes below 400% of the federal poverty limit. We encourage the Legislature to incorporate into its budget proposals the Stop SUNY Suing Bill (A.8170/S.7778). Hospital lawsuits, including those by state hospitals, can have a life-altering effect on low-income patients. The Legal Aid Society recently represented a young woman with cancer who was being sued by a SUNY hospital for costs associated with the birth of her child which were the result of a mix-up with her Medicaid application. Although SUNY eventually agreed to drop the lawsuit, it caused severe stress for an individual in a vulnerable position.

We also support the Executive's proposed amendments to the General Business Law to incorporate consumer protections into the process of consumers applying for medical and dental credit cards. The exorbitant fees and punitive terms of medical credit cards have been well documented. Prohibiting providers from filling out applications for consumers and requiring them to disclose the risks of medical credit cards are common-sense reforms which will protect consumers.

In addition, we urge the Legislature to incorporate additional reforms to protect Medicaid recipients from the financial impact of medical and dental credit cards. The Legal Aid Society has worked with consumers who have been pressured to enroll in dental credit cards to pay for services that should have been covered by Medicaid. New York should follow California's lead in mandating that providers disclose to Medicaid patients if there are alternative services covered by Medicaid before a patient enrolls in a medical credit card. California law also requires that

providers indicate in the treatment plan that they will follow Medicaid rules and secure Medicaid covered services before treatment.[1]

Restore Community Health Advocates Funding

The Legal Aid Society strongly supports the $3.5 million appropriation for the Community Health Advocates (CHA) program in the Executive Budget and urges the Legislature to provide an additional $2 million to fully restore CHA's funding.

Since 2010, CHA has provided consumer assistance services to more than 510,000 New Yorkers with both private and public health insurance in every county of New York State. The Community Service Society of New York (CSS) administers the program with the support of three Specialist agencies – The Legal Aid Society, Empire Justice Center, and Medicare Rights Center. CHA supports a network of 27 community-based organizations and small business-serving groups that provide services throughout the State and operates a helpline to provide real-time assistance to health care consumers. CHA assists with a wide range of health insurance problems including service denials, billing disputes, and questions about coverage. CSS and the Specialists provide technical assistance and accept referrals of complex cases from organizations throughout the network.

In FY23, the CHA Helpline experienced a 172 percent increase in calls, which was largely driven by Medicaid enrollees who needed intensive advocacy assistance with denial cases. Unfortunately, right when CHA experienced this enormous increase in demand, CHA's funding was cut from $5.23 million in FY23 to $4.76 million in FY24, due to an unexpected $734,000 decrease in the Assembly's support. Throughout the pandemic, CHA has served as a critical resource for New Yorkers, and CHA's services have been particularly important during the ongoing process of the Public Health Emergency unwind, as 8 million New Yorkers are in the process of recertifying for public health insurance coverage for the first time since before the pandemic. Restoring funding is essential to make sure that CHA can continue to support New Yorkers during these complex transitions.

Restore "Prescriber Prevails" and reduction of coverage for over-the counter drugs

The budget once again proposes to eliminate "prescriber prevails." This long-standing requirement ensures that the prescriber of a medication has the final word in disputes over authorizations for medications for their patients. This provision is crucial for people with complex medical conditions or where alternative treatments have failed or caused harmful side effects. The executive budget routinely proposes this repeal and The Legal Aid Society routinely urges that this important consumer protection be restored. The proposal is particularly problematic this year because in 2023 DOH carved the pharmacy benefit out of the Medicaid managed care benefit package. Most Medicaid recipients now access their drugs directly through DOH in a program called NYRx. This policy was enacted in the 2020 budget and faced fierce opposition from safety-net providers and others. In response to concerns about how the carve-out would impact consumers' access to drugs, DOH cited the strong provider prevails protections

[1] Cal. Bus. & Professions Code, § 654.3.

that would ensure seamless access. Since the carve-out was enacted in April 2023 advocates have been raising objections to DOH's policy and practice of not providing notice to Medicaid recipients denied pharmacy benefits through NYRx. In response to these due process concerns, DOH again has cited prescriber prevails as ensuring that no consumer is ultimately denied their prescribed medication. Elimination of prescriber prevails would not only harm medically vulnerable consumers but would eliminate the policy that is cushioning the harm caused by the lack of due process in NYRx.

Additionally, we oppose the proposal to reduce Medicaid coverage for over-the-counter (OTC) drugs without prior notice and comment. Coverage of OTC drugs saves money and eliminates the need for doctor's visits to get prescriptions. This is particularly important for the Medicaid population which is low-income and has more limited access to health care.

Guarantee Continuous Public Insurance Coverage for Children up to Age 6

The Legal Aid Society strongly supports the Executive Budget's proposal to amend the law to provide continuous Medicaid and Children's Health Insurance Program coverage for any eligible child under six years old. Allowing children under age six to access continuous health care coverage ensures consistent care during the first vulnerable years of life and reduces administrative burdens as children churn on and off coverage.

Eliminate the Global Cap

The Legal Aid Society opposes the extension of the Medicaid Global Cap in the Executive Budget. The cap should be eliminated. The Global Cap is entirely inconsistent with the fundamental purpose of the Medicaid program – providing high quality health care to low-income New Yorkers and individuals with disabilities. It does not account for enrollment growth or changes in service utilization. Repealing the Global Cap is the best response to the sharp increase in Medicaid enrollment in recent years and would allow the state to more effectively implement the current and proposed Medicaid expansions.

Repeal Harmful Changes to Medicaid Long Term Care Services

We urge the repeal of harmful changes to Medicaid long term care services enacted in recent state budgets, most of which have not yet been implemented, that will make it more difficult for elderly New Yorkers and individuals with disabilities to receive the Medicaid long term care services that would allow them to remain safely in the community. These provisions should be repealed:

- Minimum Needs restrictions. The Legal Aid Society supports S.328/A.6346 to repeal the new minimum requirements for eligibility for Personal Care Services (PCS), Consumer Directed Personal Assistance Services (CDPAS), and for enrollment in Managed Long Term Care (MLTC). These arbitrary standards discriminate based on diagnosis and have no legitimate connection to the need for care. When implemented, they will serve only to deny care to those who need it, hastening Medicaid recipients' decline or putting an undue burden on family members to provide informal care.

- The 30-month lookback and transfer penalty for those seeking Medicaid home care services. We support S.6414 which repeals the lookback and transfer penalty for community-based care, which will add an enormous administrative burden to home care processes and will result in dangerous delays for those seeking services.

- Elimination of Level I "housekeeping" services. These services, for individuals who need assistance with environmental tasks such as cleaning, meal preparation, or laundry, play an important role in preventing falls and other accidents that cause Medicaid beneficiaries to need higher levels of care.

Increase and phase out the Medicaid Asset Limit (S.4881A/A.5940)

Two years ago the state took important steps toward parity in Medicaid for older adults and individuals with disabilities by making the income limit consistent with the limit for non-disabled adults under age 65. However, the state has still not eliminated the "Medicare cliff," whereby individuals who have previously been Medicaid-eligible become ineligible when they turn 65 or become eligible for Medicare two years after receiving Social Security Disability because these populations are the only ones with an asset test. This blatant inequity in Medicaid eligibility for older adults and people with disabilities disrupts access to care and disproportionately leads to denials of coverage for communities of color. Given that a primary residence is exempted from the asset test, homeowners can in fact have significant assets and still qualify for Medicaid. There are stark racial disparities in homeownership in New York and nationally.

Last year, New York raised the asset limit for people in the Medicaid Buy in program. We strongly urge the Legislature to raise the asset limit to that same level for everyone else; and subsequently eliminate the asset test for everyone. Repeal of the asset limit is essential to eliminate racial disparities in health care access. CMS approved a similar phased in elimination of the asset test adopted by the State of California, in effect January 2024.

Expand Access to Quality Dental Care for Medicaid Enrollees

The Legal Aid Society commends the efforts in the Executive Budget to address the crisis of lack of adequate access to quality dental care for low-income New Yorkers. Adequate dental care is critical to overall health and well-being**.** Poor oral health is connected to cardiovascular disease, respiratory infection, adverse pregnancy outcomes and can also exacerbate chronic conditions such as diabetes. It can also have a profound impact on mental health. Poor oral health can also contribute to unemployment. People are more likely to have poor oral health if they are low-income and/or racial minorities or immigrants. As noted by the Governor's State of the State and the Commissioner of Health, Medicaid enrollees visit a dentist at drastically lower rates than non-Medicaid enrollees.[2] This is partially due to the low participation rates of dentists in the Medicaid program.[3] This crisis requires an aggressive multi-strategy approach.
While we support the proposal to expand the scope of practice for dental hygienists as one step to address the problem, much more must be done to expand the number of dentists and oral

[2] https://www.commonwealthfund.org/publications/surveys/2023/oct/paying-for-it-costs-debtamericans-sicker-poorer-2023-affordability
[3] https://www.commonwealthfund.org/publications/surveys/2023/oct/paying-for-it-costs-debtamericans-sicker-poorer-2023-affordability

health providers who serve the Medicaid population. For example, New York must significantly increase the dental network adequacy requirements in its contracts with the Medicaid managed care plans. DOH only requires the plan to offer enrollees a choice of two dentists in their service area.[4] Federal regulations also require states to consider geographic location, distance, and travel time in their network adequacy requirements.[5] While this is reflected in state law and in the model contracts,[6] these requirements do not appear to be enforced by the Department of Health because clients have reported to us wait times of over a year to be a new patient at dental offices that accepts Medicaid. Additionally, Medicaid managed care plans are required to maintain an up-to-date provider director.[7] However, plan provider directories are out-of-date requiring enrollees to search for providers on the list who take their insurance. This is an unfair burden to place on patients and an unlawful contractual violation that DOH does not enforce.

In 2021, DOH presented on dental network adequacy to the Medicaid Managed Care Advisory Review Panel. DOH concluded that "while access to care issues are documented for some dental specialties, access to general dentistry benefits does not appear to be systemically problematic based on complaint data provided by [the managed care complaint line]." This is an example of the lack of monitoring and oversight of the Medicaid managed care program that harms Medicaid consumers and hinders access to care, which we discuss further in the managed care compliance section of our testimony.

Increase enforcement of managed care plan compliance

The Legal Aid Society supports the Executive Budget's proposal to authorize DOH to impose liquidated damages for managed care plans who fail to comply with contractual requirements. We strongly support greater oversight and enforcement against plans for noncompliance. However, we are concerned about the lack of specificity and an enforcement mechanism for this proposal as DOH already has the authority and ability to impose sanctions and fines and fails to do so.

We have represented thousands of consumers who have been wrongfully denied or delayed care by their Medicaid managed care plans, including in a class action litigation calling on DOH to engage in the required monitoring and oversight of the plans.[8] DOH asserts that systemic oversight is accomplished through regular reviews required by federal law[9] and investigations triggered by complaints to its managed care complaint line.[10] Audits result in statements of deficiency and corrective action plans and attempt to serve as course correction and not a sanction aimed at deterrence. We regularly file complaints to DOH's Medicaid managed care complaint line about unlawful plan activity. While rare, on occasion DOH intervenes to resolve

[4] *See* NEW YORK DEPARTMENT OF HEALTH, MEDICAID MANAGED CARE/FAMILY HEALTH PLUS/HIV SPECIAL NEEDS PLAN/HEALTH AND RECOVERY PLAN MODEL CONTRACT (2021), Section 21.17.
[5] 42 C.F.R. § 438.68(c).
[6] SSL §364-J(8)(g) (2014); Pub. Health L. § 4403(5)(a).
[7] *ee* NEW YORK DEPARTMENT OF HEALTH, MEDICAID MANAGED CARE/FAMILY HEALTH PLUS/HIV SPECIAL NEEDS PLAN/HEALTH AND RECOVERY PLAN MODEL CONTRACT (2021), Section 13.2.
[8] Bucceri v. Zucker et al., No. 1:16-CV-08274 (SDNY); No. 1:18-CV-02380 (EDNY)
[9] 42 C.F.R. § 455.00–455.70.
[10] https://www.health.ny.gov/health_care/managed_care/complaints/

the client's individual issue. It is much more typical for DOH to simply report back the plan's version of events as its conclusion. There is virtually never any indication that the situation is being investigated as a systemic problem even when we provide evidence of such, and no consequences for the plans' unlawful behavior or contractual violation. For example, we have repeatedly contacted the complaint line regarding situations in which a plan categorized a service as "not a covered benefit" rather than a medical necessity denial, therefore depriving a consumer of their right to submit an External Appeal to fight the denial. We have identified the fact that this is a recurring issue, but have never heard from the complaint line that it is being investigated as such. We greatly appreciate that this proposal signifies an acknowledgment of a need for increased consequences for noncompliance, but our experiences lead us to be concerned about the lack of a trigger mechanism for this proposal.

DOH does not utilize its existing authority to issue fines and sanctions.[11] The lack of oversight has been noted by state and federal agencies. A recent HHS Office of the Inspector General report surveyed the seven largest Medicaid managed care organizations in the US about their prior authorization denials and found that despite an overall denial rate of one out of every eight requests, most State Medicaid agencies do not routinely review the appropriateness of their denials. Although Medicaid enrollees can appeal these denials through fair hearings, very few prior authorization denials are ever appealed.[12] Other federal and state agencies have found failures in New York's oversight of the Medicaid Managed Long Term Care (MLTC) program. In 2020 a United States Government Accountability office (GAO) report found insufficient oversight by NYS DOH.[13] In 2022, the NYS Comptroller found that New York paid $2.8 billion in premiums to MLTC plans that provided little or no services, and another $701 million for consumers who had died, moved to Assisted Living, or were otherwise not eligible for MLTC.[4] Following this report and consumer advocates' call for DOH to adopt standards recommended by CMS and to adopt transparency measures,[14] DOH did not adopt accountability measures. Additionally, Gov. Hochul recently vetoed a bill that would have required some transparency about home care usage.[15]

We greatly appreciate that this proposal suggests an acknowledgment of the need for greater consequences for plans who fail to comply. But the measure will be meaningless if DOH does not utilize its authority. We suggest that DOH impose and track metrics related to the care provided by the plans to consumers, including service denials. If plans fall below expected targets, investigations and penalties should be imposed where appropriate.

We support this proposal and continue to encourage DOH to impose and track metrics related to the care provided by the plans to their enrollees.

---

[11] 42 U.S.C. 1396u-2(1)-(2); NY SSL 364-j(4)(iii)(F); 18 NYCRR 360-1-.11; 18 N.Y.C.R.R. 360-10.10.

[12] High Rates of Prior Authorization Denials by Some Plans and Limited State Oversight Raise Concerns About Access to Care in Medicaid Managed Care. OEI-09-19-00350 (July 2023).

[13] Medicaid Long-Term Services and Supports: Access and Quality Problems in Managed Care Demand Improved Oversight. GAO 21-49 (November 2020).

[14] *Consumer Advocate Statement on New York State Comptroller Report of Aug. 5, 2022: Medicaid Program – Oversight of Managed Long Term Care Member Eligibility* (Nov. 2022, available at https://medicaidmattersny.org/wp-content/uploads/2022/11/OSC-MLTC-report-consumer-advocates-statement-11.2.22-final.pdf, citing CMS, *Promoting Access in Medicaid and CHIP Managed Care: Managed Long Term Services and Supports Access Monitoring Toolkit*, June 2022, *available at* https://www.medicaid.gov/medicaid/managed-care/downloads/mltss-access-toolkit.pdf.

[15] A1926/S1683

Conclusion

Thank you for the opportunity to provide this testimony. We look forward to working with the Assembly and Senate to advocate for a final budget that strengthens the Medicaid program and the health care safety net.

Belkys Garcia
Staff Attorney, Law Reform Unit
The Legal Aid Society
49 Thomas Street
New York, NY 10013
(212) 577-3582
Brgarcia@legal-aid.org

Rebecca Antar
Director, Health Law Unit
The Legal Aid Society
49 Thomas Street
New York, NY 10013
(212) 577-7958
RAntar@legal-aid.org