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Testimony of The Legal Aid Society

Joint Legislative Public Hearing on 2015-2016 Executive Budget Proposal: Health/Medicaid

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The Legal Aid Society respectfully submits this testimony in response to the 2015-2016 Executive Budget Proposal on Health/Medicaid. 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 statewide and federal advocacy efforts on a variety of health law and policy issues.

The Legal Aid Society applauds Governor Cuomo, the Legislature, and the Department of Health for another year of successful implementation of the Affordable Care Act and their commitment to facilitating the expansion of health care coverage for many more New Yorkers. In this period of sweeping change for New York's Medicaid program and the entire health care delivery system, it is particularly important that low-income New Yorkers' access to quality health care benefits and services is protected. We wish to comment on several proposals that we believe could have a significant impact on our clients' health and well-being.

Part B, Section 6: Elimination of "Prescriber Prevails" in Fee-for-Service Medicaid

The Executive Budget proposes to eliminate the use of "prescriber prevails" in fee-for-service (FFS) Medicaid for drugs not on the preferred drug list. Although the FFS population is shrinking as more populations are transitioned into mandatory managed care, it is essential that the rights of FFS beneficiaries are protected to the same extent as those in managed care. In addition, FFS beneficiaries include those who may have temporarily lost coverage and cannot immediately be re-enrolled in their plans when their Medicaid is reinstated. The elimination of prescriber prevails for this population could result in disruptions in care. The Medicaid Managed Care Model Contract allows for prescriber prevails for the atypical antipsychotic, anti-depressant, anti-retroviral, anti-rejection,

seizure, epilepsy, endocrine, hematologic and immunologic therapeutic classes, recognizing that these classes of drugs treat complex and life-threatening conditions for which precise and appropriate treatment is necessary. The proposed restriction would have a detrimental impact on people with disabilities, including serious psychiatric disabilities, as well as on those who rely on specific drugs and drug combinations. For these individuals, medical providers are best suited to determine which drug would treat their patients most effectively.

Part B, Section 25: Grants for Coordination between Health Homes and the Criminal Justice System

The Legal Aid Society is encouraged by the inclusion of a provision authorizing the Commissioner to make grants to coordinate between health homes and the criminal justice system. The Society's Criminal Practice is the primary provider of indigent defense services in New York City. The Health Law Unit frequently provides consultation to Criminal Practice attorneys and staff when problems with Medicaid eligibility and benefits interfere with their clients' ability to enter programs that prevent or limit jail time. Ideally, these collaborations will target high needs individuals whose mental health and/or substance abuse issues have resulted in involvement with the criminal justice system, and will deliver comprehensive case management services to help these individuals to access safe and appropriate treatment and stay out of jail.

Part B, Section 33: Limitation of Spousal/Parental Refusal

The Governor's budget would eliminate the longstanding right of "spousal/parental refusal" for vulnerable adults and children in New York State. As proposed, the "refusal" will only be applied in situations where a parent lives apart from his or her sick child or where a "well" spouse lives apart from or divorces an ill spouse.

The Legal Aid Society represents families for whom "refusal" represents the only option to secure affordable coverage. Fortunately, we have observed anecdotally that the need for spousal and parental refusal has lessened as a result of expanded Medicaid eligibility and the availability of subsidized private coverage with the Affordable Care Act. However, this provision remains an essential option for some vulnerable families who may otherwise be unable to afford coverage. Although the recent expansion of "spousal impoverishment" protections for individuals in the Managed Long Term Care (MLTC) program has made spousal refusal unnecessary for some families, spousal impoverishment is only available to those who have already been determined eligible for Medicaid. Therefore, in many cases couples cannot take advantage of spousal impoverishment without using spousal refusal to enroll in Medicaid. There are a number of additional situations in which spousal refusal remains the only option for affordable health insurance:

- Children with severe illnesses not covered by a "waiver" program, such as those with cancer whose parents cannot afford the high cost of their care;
- People excluded from MLTC, such as those receiving hospice services;

- Married adults who rely on Medicaid for acute and primary care rather than long-term care, and who cannot afford to meet their spend down to access services; and
- Married couples who rely on help with Medicare out-of-pocket costs through the Medicare Savings Program (MSP).

Part B, Section 35-36: Elimination of Immediate Needs Medicaid

The Legal Aid Society opposes the Governor's proposed elimination of temporary Medicaid to meet immediate needs of Medicaid applicants for personal care and other services under Section 133 of the Social Services Law. The implementation of Managed Long Term Care and the Conflict Free Evaluation and Enrollment Center have significantly added to the amount of time it takes for high-needs individuals enrolling in Medicaid to start receiving personal care services. By eliminating medical care and home care from the benefits that can be accessed while a Public Assistance application is pending, these delays will inevitably force vulnerable individuals who could otherwise safely live at home into nursing homes in violation of *Olmstead*. The pending *Konstantinov v. Daines* lawsuit¹ has resulted in court orders mandating New York State and New York City to comply with Section 133 and allow for immediate needs personal care services. The State proposed regulations which are not yet final and the law has still not been implemented. However, the lower courts have found that the requirement to provide immediate needs home care is based not only in State law but in the Aid to the Needy clause in Article XVII of the New York State Constitution. We urge the Legislature to recognize the obligation of the State and local districts to provide immediate needs Medicaid and reject the Governor's proposal.

Part B, Section 44: Expansion of Mandatory Medicaid Managed Care for Foster Children

The Legal Aid Society supports the inclusion in the Executive Budget of up to \$5 million for the transition of foster care children placed with voluntary foster care agencies to Medicaid managed care. The transition of this extraordinarily vulnerable population represents both opportunity and risk. In the current system, children who transition in and out of foster care must have their case changed from foster care-based Medicaid to Medicaid managed care which can cause complications and delays in care. The need for continuity of care for foster children is vital. Many foster care children need certain services and evaluations extremely quickly, and protocols must be put into place to ensure that managed care plans have the capacity and flexibility to approve services promptly and coordinate an extensive array of services and supports. The extreme vulnerability of this population coupled with the complexity of the foster care system could lead to dire consequences if children's access to care is not protected.

¹ *Konstantinov v. Daines*, 101 A.D.3d 520 (1st Dept. 2012), affirming 2010 WL 7746303 (N.Y. Sup. 2010, Hon. Joan Madden), *motion to vacate denied*, *Konstantinov v. Daines*, 2014 N.Y. Misc. LEXIS 1137; 2014 NY Slip Op 30657(U)(2014).

Funding for Community Health Advocates

The Legal Aid Society strongly supports the \$2.5 million appropriation for the Community Health Advocates (CHA) program in the Executive Budget, and urges the Legislature to increase CHA funding to \$5 million.

Since 2010, CHA has provided consumer assistance services to over 200,000 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 21 community based organizations 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 these early years of implementation of the Affordable Care Act (ACA), the need for a resource to help consumers with post-enrollment health insurance issues is especially profound. Many people are enrolled in health insurance for the first time because of the ACA or have insurance that is very different from what they had before.

CHA's funding is set to expire in June 2015 and State funding is necessary to continue and enhance this essential program.

Expansion of Independent Consumer Advocacy Network

The Legal Aid Society serves as a Specialist organization in the newly implemented Independent Consumer Advocacy Network (ICAN), a consumer ombudsman also administered by CSS that provides advice and representation to individuals receiving long term care services in mainstream Medicaid managed care, Managed Long Term Care (MLTC), and the new Fully Integrated Duals Advantage (FIDA) program. We strongly support the additional \$5 million in funding for ombudsman services as well as the significant expansion in funding and in the reach of the program planned for 2016-17 and 2017-18.

CSS and the Specialist organizations staff the ICAN hotline which is open 12 hours a day, 5 days a week to provide immediate advice and, if necessary, representation, to Medicaid beneficiaries and their families and caregivers. This week while staffing the line, a Health Law Unit casehandler received a call from the son of a 94 year old MLTC beneficiary who learned from her home care agency that her 24 hour home care would be cut to 10 hours per day with less than a day's notice. Upon investigation, we learned that the client had received written notice of her MLTC plan's intention to reduce her care several weeks earlier, and her family had timely requested an appeal which should have continued her

care pending the appeal. The plan had failed to process the appeal request. We received the call only four hours before this client's personal care aide had been instructed to leave. We immediately began making calls to the plan and to the Department of Health and before the end of the day we received confirmation from the plan that the hours would be maintained for at least six months until the plan re-assesses the client.

As new populations and benefits are carved into Medicaid managed care, it is essential that there are resources available to provide assistance to vulnerable Medicaid beneficiaries impacted by these changes. For example, this year the State will be implementing drastic changes to the provision of behavioral health services in Medicaid including the creation of new Health and Recovery Plans (HARPs) to provide services to individuals with serious mental illness and substance abuse disorders. This population has complex needs and the consequences of treatment interruptions can be disastrous. It is essential that these individuals are able to access appropriate supportive services while navigating a new care management system. Making ombudsman services available to these individuals and others who are navigating managed care for the first time will make it more likely that their rights and access to care will be protected.

Thank you for the opportunity to submit this testimony. Please contact Rebecca Novick, Supervising Attorney, The Legal Aid Society Health Law Unit at (212) 577-7958 or RANovick@legal-aid.org for more information.