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New York State Legislature
2020-2021 Joint Budget Hearing
Topic: Health

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The Center for Elder Law & Justice (CELJ) is a non-profit legal services agency that serves Western New York (WNY). Our mission is to improve the quality of life for the elderly, disabled and low-income persons in WNY. Our goal is to protect the essentials of life, such as access to healthcare, housing, and protection from abuse. We do this through the provision of free civil legal services.

The Executive's proposed 2020-2021 budget as it pertains to Medicaid is too vague and we are concerned about the lack of transparency and public involvement in the process of determining where to save $2.5 billion in the program. Medicaid consumers (Consumers) and the public need to be involved in the process and there must be transparency that includes publically available data on the costs. With our aging population, and one-third of New York's (NY) population enrolled in Medicaid, the issue of efficacy and solvency of the Medicaid program is one that impacts everyone in NY.

We are specifically concerned about the Governor's use of a Medicaid Redesign Team II (MRT II) and the 'backup' plan as stated in the Aid to Localities Appropriation bill to cut $2.5 billion if MRT II does not result in the savings.[1]

<u>The intent of the Medicaid program is to provide coverage and access to low-income people and people with disabilities.</u> The program is a lifeline to many and ensures that our older adults and people with disabilities are able to live in the least restrictive setting and have access to needed services and supports; all which support them in their daily lives and right to autonomy. As the legislature moves forward with its budget, we urge the legislature to remember the intent of the Medicaid program and the importance of the lives of the Consumer and benefits to NY.

[1] FY 2021 Executive Budget: Aid to Localities appropriations bill (pages 504-5, 514, 535, 541, 564); accessed at https://www.budget.ny.gov/pubs/archive/fy21/exec/approps/stateopsbudget.pdf

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Contrary to the intent of Governor Cuomo's Executive Budget address, where he placed blame for the deficit on the Medicaid Consumer Directed Personal Assistance Program (CDPAP), and increased use of Medicaid Managed Long Term Care (MLTC) Plans, Consumers are not a burden on the state or taxpayer. Consumers are our parents, siblings, children, and friends, and are an important and essential part of our society whose lives should not be subject to politics.[2]

Sudden changes (and cuts) to the Medicaid program is not and should not be the answer in addressing the budget deficit. The growth of the Medicaid program in NY is not a surprise and has been repeatedly pushed off for future handling. This is not the fault of the Consumer. Sudden changes and cuts to the Medicaid program, without thought to the consequences, will lead to Consumers being wrongfully institutionalized and premature deaths. This is not the NY we aspire to be.

During this difficult budget year, we urge the legislature to:

1. Oppose the Medicaid 3% cap: Medicaid Local district Spending Reforms[3]

The NY Medicaid program covers over 6 million NY residents. With the aging population, enrollment will increase.[4] While costs need to be controlled and waste and inefficiency should not be tolerated by NY or the taxpayers, the control of the Medicaid program resides with the State and Federal governments. The counties, Local Departments of Social Services (LDSS) do not control the Medicaid eligibility rules and services nor do they decide Medicaid eligibility for Consumers who became eligible for Medicaid through the Affordable Care Act.

The LDSS is responsible for determining Medicaid eligibility for those who are age 65 or older, certified disabled, or blind. The LDSS is not responsible for the "MAGI" enrollment that includes pregnant women, children under 19, adults 19-64, and disabled people not enrolled in Medicare. For individuals applying for MAGI Medicaid, they must go through the Marketplace. Of the 3,558,600 Medicaid eligibility determinations/enrollments processed in NY, 3,213,000 were for MAGI Applications and Renewals. 90% of the applications fall outside LDSS enrollment control.[5]

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[2] Governor Cuomo Budget Speech, January 21, 2020, accessed at https://www.budget.ny.gov/pubs/archive/fy21/exec/approps/stateopsbudget.pdf

[3] FY 2012 Article VII Bills: Health and Mental Hygiene Part R

[4] FY 2021 Executive Budget: briefing book, page 65, accessed at https://www.budget.ny.gov/pubs/archive/fy21/exec/book/briefingbook.pdf

[5] NYS Department of Health, Medicaid Administration, Annual Report to the Governor and Legislature, December 2018, accessed

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Medicaid eligibility rules and services are determined through Federal and State laws and regulation, not by the LDSS.[6] The role of LDSS is to do a factual determination whether an applicant meets the eligibility thresholds: the person either qualifies for Medicaid or does not. For Consumers who need long-term care services, it is Maximus (NY Medicaid Choice) that makes the determination whether a Consumer can receive long-term care Medicaid covered services in the Community.

Recent actions taken by the State that the LDSS had no control include: higher minimum wages for health care workers and requirement that the majority of Consumers enroll into managed care. Increasing wages for healthcare workers is a good thing. However it added additional costs to the Medicaid budget. The LDSS had no control over those costs.

The majority of Consumers are required to enroll into managed care plans and the LDSS have no authority over those plans. As the Department of Health states in its 2018 annual report: "the expansion of MLTC enrollment reduces the participation in programs managed by the LDSS...the responsiblity for the LDSS to assess the need for community based long term care services and authorize the level of duration of services, declines as enrollment in managed long-term care increases and the health plan assumes responsibility of managing the care."[7]

The LDSS do not have control over the efficacy and quality of the services provided by those plans. For example, the LDSS does not have authority to pressure managed care plans to control their own costs and address high turnover in staff and inefficiencies with coordination for enrollees. We urge the Legislature to consider the following: how much money could be saved in the Medicaid program if care coordination was working properly and Consumers were receiving quality care and services and not undergoing unnecessary hospital or nursing home care because the plans failed in their responsibilities to the Consumer?

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at:https://www.health.ny.gov/health_care/medicaid/redesign/docs/2018_annual_report_governor_and_legislature.pdf

[6] The NYS Department of Health is the single State Agency responsible for supervising the Medicaid Program. *See Social Services Law 20(3)(a) and 18 NYCRR 300.6:* LDSS are prohibited from applying locally developed Medicaid rules regulation or procedures that have not been approved by the State medic agency.

[7] NYS Department of Health, Medicaid Administration, Annual Report to the Governor and Legislature, December 2018, accessed at https://www.health.ny.gov/health_care/medicaid/redesign/docs/2018_annual_report_governor_and_legislature.pdf

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Lastly, Medicaid is the primary payer of long-term care services. Many seniors are on Medicaid because they cannot afford a private insurance plan to supplement Medicare, which in general does not cover long-term care. As a result, we expect there will be an increase of Consumers who are enrolled in both Medicare and Medicaid.[8] While local governments can take some steps to help support seniors so that they do not need to relay on Medicaid for coverage, it is the State and Federal governments who have the ability to pass laws and enact policies that promote long-term care services that are affordable and not have to rely on Medicaid.

2. Remember NY's obligation under Olmstead for people to live in the least restrictive setting

The landmark Supreme Court decision, Olmstead v. L.C [527 U.S. 581, 22+ S. Ct. 2176 (1999)], held that unjustified segregation of persons with disabilities is discrimination and violates title II of the Americans with Disabilities Act. It is (or should be) clear: persons with disabilities have a civil right to receive services in the appropriate integrated setting of their choosing. For a time, NY believed in this and developed an Olmstead implementation plan.[9] However, recent actions are taking NY away from the principles outlined under Olmstead:

- Nursing Home Carve Out

Is currently being implemented, requires that Consumers who live in a nursing home for more than three months be disenrolled from their MLTC plan This carve out incentivizes the institutionalization of people with disabilities young and old. There is no incentive for MLTC plans to enroll Consumers who have high care needs. Instead, MLTC plans have an incentive to deny Consumers who have high care needs who wish to return to the community since the plans now are no longer responsible for nursing home care.

As highlighted in The Buffalo News, Consumers already have a hard time returning to the community from a nursing home.[10] The nursing home carve out will make things worse.

[8] Total dual eligible at 908,101 in 2019, up from 862,84 in 2016, and from 709,217 2010. These figures are going to continue to increase.
https://public.tableau.com/profile/lauren.popham#!/vizhome/MedicareSavingsPrograms2007-March2019/County
[9] New York Olmstead Program: Community Integration for Every New Yorker, accessed
https://www.ny.gov/programs/olmstead-community-integration-every-new-yorker
[10] Michel, Lou. "After 5 years in a nursing home, a Buffalo woman moves out." The Buffalo News. April 24, 2019, accessed at https://buffalonews.com/2019/04/24/after-5-years-in-a-nursing-home-a-buffalo-woman-moves-out/

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- Attacks on Consumer Directed Personal Assistant Program (CDPAP)

Governor Cuomo, in his budget address, blames CDPAP, in part, for the high costs to Medicaid because it added 36,000 new jobs in the first nine months of 2019. In addition, the Department of Health has issued proposed rules that drastically cut funding to an essential component of

CDPAP, Fiscal Intermediaries,[11] by roughly 80% in the move to the per member per month payment system. The CDPAP is an important and beneficial program to the Medicaid program and NY. It enables the Consumer to direct their care in a cost-effective way and provides a wage for caregivers, such as adult children of the Consumer, who otherwise would receive no income to provide the care. This income helps them maintain their own daily lives since many have to quit their jobs to assume caregiving duties. Consumers and their personal assistants are properly using the CDPAP and are not be blamed.

In addition, NY prides itself as being the first state in the country to be designated as age-friendly and that older adults are "an economic powerhouse."[12] In 2018, Executive Order No. 190, required that all state agencies incorporate the Governor's Health Across All Policies.[13] The Health Across All Policies take into account the health and health system implications of decisions and avoids harmful health impacts in order to improve population health and health equity. It further states that the health and wellbeing of all citizens is essential for NY's overall social and economic development.

With the lack of transparency in the potential cuts to the Medicaid budget, we are concerned that the financial changes to be implemented will impact the services Consumers receive. Medicaid is a lifeline to many. It provides medical coverage to our elderly and disabled communities, it enables family caregivers some respite and ability to work, and it upholds the principles of Olmstead, by helping people to live in the community and make decisions about their own lives, instead of being controlled by decisions made by insurance companies and the government.

[11] The role of the Fiscal Intermediary (FI) is an important component to the CDPAP. FIs process wages and benefits for each CDPAP assistant, process all income tax and other required wage holdings, and comply with worker's compensation, disability and unemployment insurance requirements. FIs help consumers to maintain choice and direction over their daily care.

[12] Exec. Order No 190, accessed https://www.governor.ny.gov/news/no-190-incorporating-health-across-all-policies-state-agency-activities

[13] *See* https://www.governor.ny.gov/news/no-190-incorporating-health-across-all-policies-state-agency-activities

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During the budget process, we encourage the Legislature and the Executive to consider the following: how long will NY be an age-friendly state whose older adults are "economic powerhouses" when people with disabilities are inappropriately institutionalized, and older adults are left to spend all their earnings on long-term care, caregiving and leave the workforce?

3. Ensure Medicaid Consumer representation in any potential changes to the Medicaid program and transparency

We are concerned about the lack of transparency in the Executive budget. Prior Executive budget proposals were clear on the methods they wanted to take to reduce Medicaid costs. As such, the public had the ability to oppose (or support) the proposed changes that would directly impact their lives. The current Executive budget, as a whole, does not provide details, and instead leaves it up to the MRT II, led by industry executives, to make the proposed changes.

Consumers must be involved in the MRT II and any other initiatives that change or enact cuts to the Medicaid programs. Consumers must be part of the solution to growing costs. The MRT process is like a 'quasi-legislative panel' whereby the Legislature essentially gives up authority and responsibility for the statutory/budget changes to Medicaid. The power to make such changes rests with the Executive. With so much power being under the Executive's authority, it is essential that the Consumer and the general public are involved in decisions made to the Medicaid program. We encourage the Legislature to advocate that any MRT meetings must be open to the public. Materials and notices must be timely posted on the Department of Health website, and provide clear instructions on where to comment. In addition, there needs to be public forums throughout the state to receive input from Consumers and the public.

More must be done to provide the public with data on the different Medicaid programs in NY. The costs and quality services of the Medicaid program impacts everyone in NY. We urge the Legislature to require this information be publically available.

4. Hold Medicaid Managed Care Plans and providers accountable for controlling costs and providing quality care and services.

The majority of Consumers who need long-term care in the community are enrolled in MLTC plans. As a result, these Consumers expect that these plans ensure access to the services the plans are supposed to provide. This includes: care coordination, home health and personal care aides, transportation to medical appointments, and home modifications. However this is not the case and Consumers are not receiving the services and coordination the plans are expected to provide. This has resulted in unnecessary hospitalizations and other harms including neglect.

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Consumers, in an effort to receive some type of home care from their MLTC plan, are accepting reductions in their home care hours and are not willing to complain (or appeal the reduction) due to fear of losing all services. In addition, Consumers, without access to personal care aids and proper coordination, are being forced to leave their community homes and become institutionalized in nursing homes.

Consumers and other NY residents want and deserve to remain in the community. Reports of substandard nursing home care in NY are common and the enforcement of basic care standards are lacking.[14] The substandard care, abuse, and neglect that occurs in our country's nursing homes, and the financial and personal costs of this care, are not a surprise.[15] People do not want to be institutionalized.

We urge the Legislature to support measures that hold MLTC plans accountable. Once such measure would be to require the Department of Health publically post MLTC data (such as enrollment, dis-enrollment, reductions in care hours, etc.) in a user-friendly format.

In addition to holding MLTC plans accountable, we urge the Legislature to hold providers accountable to ensure Consumers receive the proper services and supports. For example, under Part D of the Executive's Health and Mental Hygiene Article VII Legislation, it is proposed that the Enhanced Quality of Adult Living (EQUAL) Program funds are specifically expanded to provide mental hygiene training for Adult Care Facility (ACF) staff.

We support the intent of the EQUAL Program; it is meant to improve the quality of life for ACF residents who are in the greatest need. However, we do not necessary support the idea that those funds be directed to train ACF staff, whose operators should already make sure staff have the appropriate training and skillsets to provide supervision and services to all its residents. Providing proper and quality services to persons with serious mental illness is important, but funding for that should come from another avenue. Under the EQUAL Program requirements, it is the residents who decide what the funding should be used for. While we support the EQUAL program, have concerns that the changes to the EQUAL program, will limit resident choice.

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[14] For example, *see* Michel, Lou. "Nursing home cited after maggots found on 89-year-old woman's wound." The Buffalo News. January 13, 2010, accessed at: https://buffalonews.com/2020/01/13/nursing-home-cited-after-maggots-found-on-89-year-old-womans-wound/; *see also* CELJ Report: "Emerald South: Profile of a Nursing Home", July 13, 2018, accessed at: https://elderjusticeny.org/wp-content/uploads/2018/08/Emerald-South-Profile-of-a-WNY-Nursing-Home-FINAL.pdf

[15] Government Accountability Office: GAO-19-433. "Nursing Homes: Improved Oversight Needed to Better Protect Residents from Abuse." June 2019. Accessed at: https://www.gao.gov/assets/700/699721.pdf

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Summary

The costs of long-term care need to be addressed at the State (and Federal) level. In addition to addressing inefficiencies at the MLTC and provider levels, we encourage the Legislature and Executive to review the need for a Global Cap and ensure it does not act like a de-facto Medicaid block program. The 2011 changes lead to the Legislature giving up a lot of its power to the Executive with respect to controlling Medicaid costs. This included empowering the Commissioner of the Department of Health to unilaterally cut payments to providers and delay payments into the next fiscal year. The deficit to Medicaid appears to be artificial. Transparency about the costs is essential.

NY made the decision to expand Medicaid and as a result 95% of the population is now covered by some type of health insurance. Coverage is a good thing, and Consumers should not be blamed for using it. Sudden changes and cuts to the Medicaid program, without thought to the consequences, will lead to Consumers being wrongfully institutionalized and premature deaths. NY cannot turn its back on its working poor, disabled, and seniors, all of whom rely on the access to services and supports Medicaid provides. It is not good public policy to celebrate the expansion of Medicaid and 95% of the population is covered, but then blame those who use the coverage. Consumers and their caregivers are not to blame.

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

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