Everyone:

Please see DFS supplemental answers below, if the Legislature decides to provide all agencies follow up answers to public, please let me know, so I can provide the answers in a more formalized format. I will be providing the same answers to the Senate. In addition any matter that is related to a specific issue in a district or constituent, we followed up directly with members office.

Superintendent Linda A. Lacewell February 25, 2021 Budget Testimony Supplement

Following Superintendent Lacewell's testimony on February 25th several questions were posed to her regarding Budget related matters. DFS submits the following information to provide clarity on matters that are in the DFS jurisdiction. In addition, DFS has consulted and raised other budget matters to the appropriate agencies with subject matter jurisdiction.

HEALTH INSURANCE QUESTIONS

1. Early Intervention

Question

Insurers only pay about 2% of Early Intervention (EI) costs. Is it time to change the way insurers participate in the EI program?

Response

The EI Program, which is administered by DOH, provides important therapeutic and support services for infants and toddlers with disabilities and their families. These services are funded from a variety of sources, including Medicaid, commercial insurance, self-funded employers, as well as the State Fiscal Agent. It is important to recognize that not all those funding sources cover all EI services. For instance, commercial insurers typically do not cover nutrition or family education services. Self-funded employers (which DFS does not regulate) may have other coverage limitations.

Commercial insurers are only billed for 11% of all EI claims and, after claims processing, pay 2% of all EI claims. The other 89% of claims are billed to other sources. Below is a breakdown of the percentage of claims billed to all payers (based on 2019/2020 claims):

- Medicaid 57%
- EI Escrow Fund[1] 32%
- Commercial insurers 11%

DFS is in the process of investigating insurer payment of claims for EI services.
Our preliminary findings indicate the following:

- Many of the claims billed to insurers were for self-funded coverage, not commercial coverage, and therefore were not the responsibility of the insurer.
- Many of the claims were appropriately denied for the following reasons:

[1] The EI Escrow pays claims when a child is uninsured, covered under a self-funded plan, or when services aren't otherwise covered.

- provider is out-of-network and the child's family did not have out-of-network benefits
- the family had not met their insurance deductible
- the visit limit for the insurance benefit had been exhausted
- the benefit is not covered under the insurance policy (for example, family training, parent support groups, respite services, transportation services, and some therapy services are not mandated benefits that must be covered by insurance), or
- the child or family is no longer covered under the insurance policy.

In addition, DFS examiners now review EI claims processing as part of their market conduct exams.

Finally, DFS is working with DOH to ensure that insurers have sufficient networks of providers to meet the needs of insureds for EI services. In 2020, DFS and DOH revised the network adequacy standards to require that insurers include EI-certified providers in their networks.

Question

A fiscal agent has received significant amount to increase EI claims paid by insurers, but the number has been stagnant or even dropped. Can you please comment?

Response

Public Health Law § 2557 permits DOH to contract with an entity to serve as the fiscal agent (SFA) for the fiscal management and payment of early intervention claims. Public Consulting Group has served as the SFA since 2013. DFS has no regulatory role in the selection or supervision of the SFA. We have conferred with DOH, and DOH confirmed that they will provide additional information separately in response to this question.

Question

Should NYS impose an assessment on insurers for costs of the EI program?

Response

For any new assessment, directive, or benefit mandate, DFS generally looks at the premium impact to determine the impact on consumers in terms of the affordability and accessibility of health insurance coverage, as well as any unintended consequences. DFS has not performed this analysis, which we would need to do before commenting on the proposal.

2. ACA and Essential Plan Trust Fund

Question

The budget proposes to take $420 million from the Essential Plan Trust Fund and use it for "rate enhancements" under the Essential Plan. Is this an allowable use under the Affordable Care Act?

Response

The Essential Plan is administered by DOH, and the question would be more appropriately answered by DOH. However, we understand from DOH that this proposal will enhance provider reimbursement and support access to healthcare services by allowing plans to utilize the funds with their providers to improve

care and patient access to providers. We have conferred with DOH, and DOH confirmed that they will provide additional information separately in response to this question.

3. Mental Health and Substance Use Disorders

Question

Why are mental health and substance use disorder (MH/SUD) claim denials reversed on external appeal more frequently than medical/surgical claim denials?

Response

Ensuring insurance coverage for MH/SUD services is an important priority for DFS, especially during the pandemic as consumers face the added stress of potential health and economic consequences of COVID-19. We have worked hard to make sure that insurers are properly implementing MHPAEA and other laws pertaining to MH/SUD coverage. The higher percentage of external appeal reversals of MH/SUD denials is concerning. By itself, it does not necessarily demonstrate a parity violation, but it does serve as a red flag that warrants further investigation, which is already underway. DFS has contacted several insurers to request additional information. Once all the information has been submitted, we will work with the Office of Mental Health, the Office of Addiction Services and Supports, and DOH to analyze the information and take any additional actions as warranted to ensure that MH/SUD coverage for those who need it.

4. Insurance and COVID-19 Vaccination

Question

Why it is necessary for consumers to provide insurance information at state-run COVID-19 vaccination sites since the vaccine is being provided for free?

Response

There are two costs associated with the COVID vaccine: (1) the cost of the vaccine and (2) the fee to the provider for administering the vaccine ("administration fee"). Currently, the cost of the vaccine is being paid by the federal government. The state-run vaccination sites do not charge patients or insurers an administration fee, but other providers (other than the state-run facilities) administering the vaccine can charge insurers an administration fee. Insurance is not required to get a vaccine at a state-run vaccination site. The state-run vaccine sites collect insurance information if it becomes necessary to bill insurers for the administration fee.

5. Administrative Simplification Workgroup and Workers Compensation

Question

Given the amount of paperwork involved for submitting claims and obtaining payment under Workers' Compensation, would it be possible to include Workers' Compensation representatives on the Administrative Simplification Workgroup?

Response

DFS is implementing the Administrative Simplification Workgroup as part of last year's budget. The workgroup provides a way for DFS and the relevant stakeholders to reduce administrative costs for hospitals and insurers and in turn help reduce health care costs in general. The Workers' Compensation Board is working on its own administrative simplification initiative, and any overlap, which we do not currently perceive, will be jointly reviewed.

6. Billing for COVID-19 Testing

Question

Some urgent care centers are billing individuals seeking a COVID-19 test for an office visit when such services may not have been necessary. Is this authorized?

Response

DOH has regulatory authority over providers at urgent care centers. With respect to insurers, DFS issued a regulation prohibiting issuers from imposing copayments, coinsurance, or annual deductibles on visits to diagnose COVID-19 at an emergency department of a hospital or an in-network provider's office, urgent care center, or other outpatient provider setting able to diagnose the COVID-19.

In addition, under the federal CARES Act and related guidance, insurers must cover, without cost-sharing, items and services furnished to an individual during visits that result in an order for, or administration of, a COVID-19 diagnostic test, but only to the extent that the items or services relate to the furnishing or administration of the test or to the evaluation of such individual for purposes of determining the need of the individual for the test, as determined by the individual's attending healthcare provider. These items and services must be covered without cost-sharing when medically appropriate for the individual, as determined by the individual's attending healthcare provider in accordance with accepted standards of current medical practice. We have relayed this information to DOH given its oversight role with regards to urgent care centers.

7. Telehealth

Question

How can NYS expand broadband and telehealth to underserved areas?

Response

Increasing broadband access and expanding use of telehealth are both priorities in the Executive Budget given the ongoing pandemic. The Executive Budget includes the proposal to require audio-only (telephonic) as a covered mode of receiving telehealth services, meaning a patient would only need access to a telephone (landline or mobile), not audio-visual technology.

The Executive Budget also includes a proposal to require insurers to have an adequate telehealth network for patients to access, which would include the availability of in-state providers.

Also, the Governor's 2021 State of the State would expand broadband access with the following proposals:

- Broadband Access – Require any broadband service provider operating in the State to offer low-income consumers a $15 per month internet.
- COVID-19 Hardship Fund – Establish an emergency fund to pay for internet subscriptions for students who cannot afford them.
- Broadband Consumer Protections – Require adherence to a universal 'broadband disclosure' that explains all charges and fees in plain and easy to understand language to protect against unexpected charges.
- "Dig Once" Policy – Establish a "dig once" policy which aims to get conduit, fiber, and other assets, placed at a very low cost as part of other projects.
- Consumer Assistance Website – The State will launch a website to help New Yorkers find the affordable plan in their area and report on coverage gaps and consumer experiences.

8. Suballocations for Family Planning

Question

Can DFS provide details on the suballocations that are included in the Department's budget that are derived from insurance companies and bank assessments? Also explain the proposed increase in suballocations for family planning in the Executive Budget?

Response

The Department of Budget is taking the lead on this question and providing further explanation during negotiations with the Legislature.

9. Pharmacy Benefit Managers (PBM)

Question

What is DFS' position regarding the Gottfried/Breslin PMB bill currently pending in the legislature and the impact of the Supreme Court's decision in the Rutledge matter?

Response

The Executive Budget proposes language that would achieve DFS's and the legislature's mutual goals. The Rutledge decision may be helpful but is not directly on point. We believe that litigation risks for states with respect to preemption remain in the wake of the Rutledge decision. The overarching takeaway is that the legislature and the executive agree that oversight is needed to protect consumers and DFS will continue to work with the legislature to achieve this common goal.

10. Consumer Drug Spike and Drug Accountability Board

Question

A constituent in my district just received a huge increase in cost for their medication. What are their options? What is the Drug Accountability Board?

Response

DFS Consumer Assistance Unit reached out to Oxford about this matter and were notified that the policy in question was issued in Connecticut, therefore DFS lacks jurisdiction in this matter. DFS spoke directly with the constituent to explain the matter and other possible avenues of resolution.

Any consumer with questions about their coverage can contact the Consumer Assistance Unit by calling 800-342-3736 or by sending an email to Consumer@dfs.ny.gov . Consumers can also file a complaint using our online complaint form at www.dfs.ny.gov/complaint

DFS provided background to the Senator on the new drug price spike authority. Explaining that pursuant to last year's budget Article 7, the Superintendent has the authority to launch an investigation when a prescription drug has increased in price, over a period of twelve months, by more than fifty percent and the Superintendent believes that it is in the public interest that an investigation be made. The new Office of Pharmacy Benefits was formed to conduct these investigations. The OPB may also demand documents and data, examine witnesses under oath, and subpoena relevant parties. We highlighted the ability for anyone to report a spike in the price of a drug through DFS's website and the email for the Office, DrugPriceSpikes@dfs.ny.gov.

DFS also explained that the legislation included a panel of experts called the Drug Accountability Board (DAB) and refer matters to the DAB membership, which will review the record, provide critical advice to DFS on issues such as whether increases in the price of the drug over time were significant and unjustified, and record those expert determinations in a report to the Superintendent. This board has been appointed and the membership represent some of the best New York State has to offer and brings together appropriately varied experiences to tackle this complex issue.

Finally, DFS explained that the new authority sheds light on this industry and those who spike prices without justification, the theory being sunlight is the best disinfectant. To that end, upon receipt of the DAB's report, the Superintendent can hold a public hearing where the manufacturer or others can be called to answer to the public for the unjustified price hike.

11. OPWWD Contracts with Local Pharmacies

DFS connected the Senator's office with OPWWD to address his concerns.

PROPERTY INSURANCE QUESTIONS

12. Excess Medical Malpractice

Question

What is DFS's position on the proposed cuts to the Excess Medical Malpractice Layer in this years proposed budget?

Response

DFS has worked to restore the Medical Malpractice Insurance market so that it now has stable rates and attracted new entrants. Further, patient safety standards have improved medical practices in the last decade to reduce risks. According to DOH, policyholders may not need the State to provide the excess layer to the same degree as in earlier years, which could provide budget relief. As this falls into DOH's and DOB's jurisdiction, we have conferred with them to confirm that they will provide additional information separately in response to this question.

Question

Doesn't the proposed budget proposal affect healthcare providers serving the neediest and most underserved communities, who need to stay in the Pool to be able to afford necessary coverage?

Response

We understand from DOH that the manner of reducing the Excess Layer funding is intended to provide an option to the healthcare providers to opt out of the Pool rather than pay towards an unneeded policy. Protecting and expanding access to medical services in underserved communities and helping to reduce health disparities are priorities for DFS. We have communicated these concerns to DOH, and they have confirmed that they will scrutinize this issue and respond separately to you.

Question

Will providers who leave the Pool provide sufficient cost savings to offset the proposed cuts?

Response

While there has been a decline in the number of providers in the Pool, the cost savings likely achieved this year if the Pool funding were left intact fall well short of the cost savings projected under the proposal.

Question

Will the Federal Stimulus Package Supplement provide the necessary funds to avoid the cut?

Response

This falls within DOH's jurisdiction. As such, we have conferred with DOH, and DOH confirmed that they will provide additional information separately in response to this question.

Question

Are Medical Malpractice Insurance rates too high generally?

Response

The basic formula for medical malpractice rates is that they are calibrated to cover losses covered under the policy, the cost of adjudicating those losses, administrative costs, acquisition costs, and relevant taxes.

New York medical malpractice rates are affected by many factors. Upward pressures include the following: very high medical malpractice judgments, which increase settlement costs; higher costs of living, which increases administrative costs; elevated claim adjudication costs; and higher costs and expenses for remediating bodily damage. In addition, New York is one of the minority of states that does not limit medical malpractice judicial awards.

By law, the Superintendent of Financial Services sets the medical malpractice rates in New York. Extensive work to reach those decisions is done by the insurers, experienced DFS actuaries and an actuarial firm retained by DFS to provide an independent view.

The past ten years have seen the medical malpractice market improve, with patient safety limiting malpractice events (i.e., lower loss costs), insurers becoming more financially secure, competition increasing, and rates becoming more stable. The result has been little or no rate increases year over year.

Question

Is DFS concerned that the cost of the excess layer will shift to the providers?

Response

As noted above, we understand the proposal is intended to afford healthcare providers an option to opt out of the Pool rather than pay towards an unneeded policy. We have conferred with DOH, and DOH confirmed that they will provide additional information separately in response to this question.

Question

Are Risk Retention Groups ("RRGs") shutting down in New York? And is this leaving doctors without medical malpractice coverage?

Response

Although the Federal Risk Retention Act essentially prohibits DFS from regulating Medical Malpractice RRGs doing business in New York, DFS tracks their registration and premium activity. Looking back three years, the number of such RRGs and the aggregate premium written by them continued to rise.

We note that providers with primary policies written by RRGs cannot qualify for the Pool. We also note that a RRG writing medical malpractice insurance in New York was declared insolvent in 2017, which highlighted DFS's concern that providers and tort victims can suffer as a result of the federal exemption from regulation that RRGs enjoy.

13. **Business Interruption**

Question

Does DFS have a position or recommendation regarding a Federal TRIA-type bill?

Response

DFS recognizes the importance of business interruption (BI) insurance, particularly to small and medium sized businesses, and has been focused on the BI issue since the very beginning of the pandemic. On March 10, 2020, DFS required insurers providing BI coverage in New York to explain their coverage positions on their respective policy language to their policyholders. Moreover, DFS reminded insurers that they have an obligation to treat their policyholders fairly. DFS cannot dictate outcomes of coverage disputes, which are governed by the language of the policy and often the subject of litigation.

DFS appreciates that the magnitude of the risks arising from a pandemic makes pricing BI coverage exceptionally difficult and very likely prohibitively costly. Accordingly, a national solution is required through the federal government's ability to provide bailout funding. DFS is aware of four proposals that have been advanced in Congress, but none has crystalized into a clear choice. The new federal administration is still settling in and handling other priorities. We continue to monitor developments should an opportunity arise for DFS to comment. DFS reserves comment on any New York State bill unless and until requested by the Executive Chamber.

Question

Did any BI policies pay out during the pandemic in New York or for claims unrelated to the pandemic? Does DFS have any claims data? Does BI insurance benefit policyholders?

Response

DFS does not require claims payment information from insurers that wrote BI insurance or any other type of insurance. While DFS might be able to request that information, we expect insurers to claim that the information is proprietary and confidential such that it could not be made public.

As to the value of BI insurance generally, it is a line of business that is often added for little or no cost to a larger package of coverages needed for a business. It is designed as an additional coverage for limited and local risks (e.g., a fire in the business damages the building causing a temporary shutdown of the business, and the insurer might provide benefits to cover related costs, expenses, and/or lost profits, as set out in the policy language). In that regard, it is a valuable coverage at a limited cost to the policyholder.

14. No Fault Panel

Question

Does DFS believe that the No-Fault Panel should include members appointed by legislature (2 from each house majority and minority conference) and is there a need for representation from the insurance industry?

Response

As the proposal stands today, the task force would be comprised of eight members appointed by the Governor and would include consumer representatives, health insurers, trial attorneys, health-care providers, and insurers. With the wide array of entities involved in the No-Fault regime, we

appreciate that other interested parties are likely to emerge wishing to participate in a discussion regarding its possible elimination. We expect that the task force composition will be a matter of negotiation for the Executive Chamber and others.

DFS believes that a full discussion of an elimination of No-Fault and its likely ramifications might be helpful to understand if that is a worthy goal or if adjustments to No-Fault could improve it and help it to retain its original purpose.

15. Cannabis Legalization and Auto Rates

Question

How will the proposal to legalize cannabis affect auto insurance rates, employer liability and other issues?

Response

DFS has had discussions with other states, insurers, insurance trade groups and consumer representatives about the impact that the legalization of cannabis might have on insurance products and rates. Essentially, this is a developing issue. Insurers have almost universally shied away from covering cannabis companies because cannabis remains on the Federal schedule of illegal substances. Accordingly, a credible data set of the increase or decrease in risk exposure has not developed to accurately predict the impact on rates. Similarly, we did not hear a consistent view as to whether rates should rise, fall or remain constant.

How employer liability might be treated with regard to insurance coverage has also been a discussion point—for example, issues such as safe workplaces, standards and reliability of testing, whether cannabis use might create more liability for an employer in connection with any particular covered class and rate impact. Again, there is no consensus as to how those issues might be addressed.

We also think that our proactive efforts will spur more thought throughout the market so that issues can be advanced so that the insurance market is receptive to the larger initiative to provide cannabis business opportunities in New York. Our general sense from our array of discussions is that the insurance industry would like to issue policies to cannabis businesses but is taking a cautious approach.

16. Midwives and Medical Malpractice Insurance

Question

What could be done to allow midwives to purchase the coverage for the services they provide, which would be far less expensive than including coverage for births? What are the current options for Medical Malpractice coverage for midwives? Are there products that are just cover prenatal care services rather than all delivery services, which midwives do not perform?

Response

A review of currently approved Mid-Wife policies does not show one restricted to prenatal care services. Nor has DFS been asked to approve one. (Note that DFS approval is necessary for any such

policy to be issued by a licensed insurer.) It is possible that a medical malpractice risk retention group writing in New York could have issued a policy that is restricted to prenatal care; since DFS does not regulate risk retention groups, we would not have access to this information.

We are not aware of a demand for this type of policy and intend to reach out to the medical association that raised the point to learn more. We are prepared to discuss this issue with our licensed medical malpractice insurers to see if they have registered any demand from their policyholders and/or if they are interested in offering such a product. We are also prepared to consider a filing to approve such a policy in the market.

OTHER QUESTIONS RAISED

17. Bank Branch Closures

DFS efforts related to Amalgamated's Roosevelt Island Branch Closure:

DFS was made aware of Amalgamated's plan to close Roosevelt Island branch last year.

The bank explained that it had determined to close the branch due to the high cost of operating a full-service branch, combined with insufficient deposit volume, lower customer foot traffic, and the bank's sustained challenges over the years to reach profitability, after taking into account factors, such as the impact on the community, the bank's ability to provide continuity of services, and other alternatives.

DFS then requested that Amalgamated take steps to assist the branch customers transition to alternative services including on-line services, and also helped facilitate a discussion between Amalgamated and several government representatives organized through City Council Member Ben Kallos, Manhattan Borough President Gale Brewer and state representatives – in order to inform the community about Amalgamated's plans. Two Zoom meetings/calls were held (December 2020 & January 2021) to discuss the bank's transition efforts and community outreach.

DFS facilitated discussions with Amalgamated to provide continued and appropriate customer services to those with accounts with Amalgamated on Roosevelt Island. As a result of those meetings Amalgamated engaged in an outreach effort, which included telephonic communications with its branch retail customers as well as business customers. Amalgamated provided assistance to customers with the transition to on-line banking, identified the fee-free Allpoint ATM on Roosevelt Island, at 425 Main Street, and informed customers about Amalgamated's creation of an "On-line Branch" specifically to assist customers who are using internet banking.

During the course of the customer outreach Amalgamated also identified the existence of safety deposit boxes as one of the key services requiring transition and assisted customers who wanted to maintain a safety deposit box with Amalgamated to transition to Amalgamated's Union Square location.

DFS is engaged with local officials and the Roosevelt Community and is committed to use its best efforts to explore options for provision of financial services to residents of Roosevelt Island. To that end, DFS is in the process of reaching out to a number of other financial institutions, which may be good candidates for either a branch on Roosevelt Island or other alternatives, and to engage with community to join the BDD program.

DFS looks forward to continued discussions with A/M Seawright, other government representatives and the community in our joint goal to make sure Roosevelt Island residents have access to financial services. the market.