THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44th STREET
NEW YORK, NY 10036-6689

COMMITTEE ON MENTAL HEALTH LAW

KATHERINE CLEMENS
CHAIR
MFY Legal Services
299 Broadway, 4th Floor
New York, NY 10007

15-04

Re: S. 7296-A

Dear Legislator:

On May 5, 2004, the Committee on Mental Health Law of the Association of the Bar of the City of New York (the "Association"), on behalf of its 22,000 members, added its voice to those who have called for the elimination of the injurious discriminatory limitations on mental health coverage that still exist in insurance policies issued all across New York State.

The Association called for an end to the needless suffering caused by these arbitrary barriers that prevent or delay New York's families from accessing available and effective treatments for mental illnesses.

After a review of the legislative experiences of some 30+ other States that had already enacted one form or another of mental health parity, the Association issued a report urging the enactment, during this legislative session, of S. 5329/A. 8301 ("Timothy's Law").

Following the issuance of its Report, the Association learned that, on May 21st, a significantly more restrictive bill was introduced in the Senate ("S. 7296-A").

While the Association appreciates the attention that the Senate is now giving to this critical public health issue, it has concerns about several restrictions that are contained in S. 7296-A. The Association urges you and your colleagues to work with Assembly leaders to resolve the differences between Timothy's Law and S. 7296-A so that a bill implementing extended mental health coverage is enacted this Session. While we see areas where the two houses can reach agreement, the following aspects of S. 7296-A are of critical importance:

1. By Permitting Employers to Opt Out of Mental Health Coverage By Submitting an Actuarial Certification of a Projected 2% Premium Increase Employers are Permitted to Avoid Coverage Based Upon Projected Experience And Not Actual Experience

Authorizing employers to opt out of the coverage based upon actuarial ***projections*** of future anticipated cost increases will effectively dilute any mental health parity bill. Although the requirements of the American Academy of Actuaries provide some measure of consistency among actuarial studies, it is undisputed that all actuarial analyses contain ***actuarial assumptions*** that vary from study to study and which materially influence the results of each study.

If employers are to be permitted to opt out of coverage due to an economic hardship or adverse experience, it should be based upon ***actual experience*** and not projected estimated cost increases. In addition, the Legislation should provide that such an exemption should have a limited duration and that the employees so affected should be given a risk pool facility to obtain coverage elsewhere. Finally, when the average increase in health insurance premiums increased 18% in 2003, and is expected to rise 10% this year[1], permitting employers to opt out of the extended mental health benefit based upon a projected 2% increase would in reality undermine any attempt to ensure that New Yorkers receive adequate mental health coverage.

2. By Exempting Employers with Fifty or Fewer Employees, S. 7296-A Leaves a Significant Amount of New Yorkers Unprotected According to New York State Department of Labor Statistics

S. 7296-A would exempt business establishments with fifty (50) or fewer employees from its requirements. Although the expressed Legislative intent of S. 7296-A is "to strengthen and enhance"

> . . .Federal law that has prohibited the imposition of lower annual and lifetime dollar limits by certain plans on mental health coverage, and to ensure that mental health coverage is provided by insurers and health maintenance organizations, and is provided on terms comparable to other health care and medical services (S. 7296-A, Section 1),

according to the New York State, Department of Labor ("NYS-DOL"), the "fifty employee exemption" would leave a significant amount of New York's workers ***unprotected*** by the new Law.

The NYS-DOL recently reported on its website and stated that:

> [E]stablishments with 50 or more employees. . .employed

[1]Milt Freudenheim, *Increases in Health Care Premiums Are Slowing*, N.Y. TIMES, May 27, 2004, at D1

a majority (57%) of private sector workers.[2]

Thus, according to the NYS-DOL, an estimated 43% of New York's private sector workers would not be covered by the scope of S. 7296-A, thus thwarting the intent of the Senate.

There is also little justification for the "fifty employee exemption" in today's economy. Today, it is no longer safe to assume that an employer who employs fewer than fifty employees is less knowledgeable - - less sophisticated - - less profitable - - or any less able to gain access to insurance markets for its employee health plans, than an employer with more than fifty employees.

Many other states, such as California, have enacted mental health parity laws without any small business exemption.[3] While it is true that parity laws enacted in some other states have included exemptions for business establishments with fewer than a prescribed number of employees, such thresholds have consistently been set at a significantly lower number than fifty employees.

As for those small businesses in New York which might be adversely impacted by a parity law, the Association encourages the houses to figure out an acceptable method to offer appropriate incentives to them.

3. By Creating a New Term: "Biologically Based Mental Illness", S. 7296-A Departs from the Diagnostic Indicator Used Throughout the United States, and Fails to Achieve "Comparable" Coverage for Mental Health

In an ideal world we would prefer that anyone seeking mental health care be able to receive it, we understand that there are some financial limitations that the legislature must consider. While we therefore appreciate the Senate's attempts to more narrowly define the range of illnesses that could be covered under the Assembly plan, we believe that the Senate bill is far too restrictive.

S. 7296-A uses the term, "biologically based mental illness", and picks only a few of recognized mental illnesses and symptoms. The Association believes that using instead those diagnoses set forth in the American Psychiatric Association's, Diagnostic and Statistical Manual on Mental Disorders, Fourth Edition, Washington, D.C., American Psychiatric Press, 1994 (the "DSM-IV") could allay fears that those without legitimate mental illness will consume resources which would be better spent on those more in need, while ensuring that those with illnesses recognized as serious by mental health professionals receive appropriate care.

---

[2] NYS-DOL, "Employment in New York State", as posted on http://www.labor.state.ny.us/pdf/enys0104.pdf.

[3] See AB88, signed into law on September 27, 1999.

The validity of the DSM-IV is confirmed by the fact that, in the United States, mental disorders are diagnosed based upon the DSM-IV.[4] In contrast, the new term "biologically based mental illness" in S. 7296-A does not comport with medical terminology used by mental health practitioners in New York State and throughout the United States.

For instance, while the NIMH and DSM-IV recognize three main types of eating disorders (anorexia nervosa, bulimia nervosa, and binge-eating disorder), the new listing contained in S. 7296-A arbitrarily includes only the first two.

While the NIMH and DSM-IV recognize three main areas of "depressive disorders" (major depressive disorder, bipolar disorder and dysthymic disorder), the new listing contained in S. 7296-A arbitrarily omits dysthymic disorder, while expressly listing the other two. We are left to wonder whether it is to be included within the scope of coverage.

While the NIMH and DSM-IV recognize "post-traumatic stress disorder", the new listing contained in S. 7296-A omits it from the listing.

A number of other states use "broad-based" definitions of mental illness in their parity statutes (see, e.g., Connecticut, Maryland and Vermont),[5] and therefore do not rely on a list. Insofar as S. 7296-A was drafted following a review of those states which use "biologically based illness" in their parity statutes, it bears emphasizing that the majority of states which utilize a list in describing which illnesses are covered in their parity statutes use a much broader definition, i.e., "serious mental illness," including California, Pennsylvania and Illinois.[6]

If the Senate is insistent that any New York State parity law must contain a list of covered mental illnesses, then the Association urges the Senate to consider a more comprehensive list than that set forth in S. 7296-A, and to use the phrase, "including but not limited to," which is currently missing from the Senate's proposed bill. The failure to do so could leave many New Yorkers with recognized, legitimate illnesses without coverage.

---

[4] See National Institute for Mental Health website at www.nimh.nih.gov, 2004.

[5] See Marcia C. Peck et al., *An Analysis of the Definitions of Mental Illness Used in State Parity Laws*, 53 PSYCH. SERVS. 1089 (2002); see also http://www.mhlg.org/chart_3-03.pdf.

6 See id.

4. By Adding a "Functional Limitations" Test To the Definition of "Biologically Based Mental Illness", S. 7296-A Places a Burden on Mental Health Coverage That Is Neither Comparable With, or Applicable to, Other Health Care

Although the intent of S. 7296-A is to ensure that mental health coverage is provided by insurers and health maintenance organizations on terms comparable to other health care and medical services, it does precisely the opposite by including a "functional limitations" test which a person must meet in order to obtain coverage.

Under the provisions of S. 7296-A, not only must a person have one of the loosely-defined "biologically based mental illnesses", but that illness must "substantially limit the functioning of the person with the illness" (see Section II [5][A][II]).

No such requirement exists upon the person who seeks treatment for other health care.

While "functional limitations" requirements are generally and legitimately found in ***disability*** insurance policies (where the inquiry is whether the person is able to perform the duties of his/her occupation following the injury or disability), they have no place in a health insurance policy. Nor do they have any place in a society that is trying to encourage people with mental illnesses to obtain treatment at an earlier and less costly stage in their conditions.

5. By Restricting the Definition of "Children with Serious Emotional Disturbances" To Various Life Threatening Incidents, S. 7296-A is Inconsistent with Public Policy Which Favors Early Intervention for Childhood Psychiatric Conditions

In restricting the scope of mental health coverage for children and families, S. 7296-A uses the term, "children with serious emotional disturbances". This term is defined as a child, under eighteen years of age, with a diagnosis of attention deficit disorder, disruptive behavior disorder, or pervasive development disorder, ***and where there are***:

> (I) serious suicidal symptoms or other life-threatening self-destructive behaviors;
>
> (II) significant psychotic symptoms (hallucinations, delusion, bizarre behaviors);
>
> (III) behavior caused by emotional disturbances that placed the child at risk of causing personal injury or significant property damage; or

(IV) behavior caused by emotional disturbances that placed the child at substantial risk of removal from the household.

This mental health coverage for children and families is not "comparable" with other health policies.

For instance, health insurance policies do not require cancer patients to wait until their cancers are at a late stage before deciding to provide coverage. Nor do such policies cover diabetics only when a coma is imminent.

One of the motivating forces behind the introduction of S. 7296-A was the courageous advocacy of the O'Clair family who lost their son Timothy to suicide. The Association is concerned that under the restrictions set forth by S. 7296-A, the proposed coverage for children and families will not commence until other New York families are dangerously close to the same tragic position.

It has been estimated that there are approximately 520,000 children in New York State with serious emotional disturbances, yet only one in five receives treatment.[7] With the New York State Office of Mental Health supportive of early intervention to treat psychiatric conditions in children, it would be against public policy to enact provisions in S. 7296-A that are inconsistent with this policy.

6. By Exempting Alcoholism and Chemical and Substance Abuse From the Scope of Mental Health Coverage, S. 7296-A Carves Out a Large Percentage of Individuals With Co-Occurring Conditions

S. 7296-A carves out individuals with mental illness and a co-occurring substance abuse disorder from the scope of its coverage.

Medical research shows that there is a significant tendency for those with serious mental illnesses to self-medicate. In fact, 37% of those who abuse alcohol, and 53% of those who abuse drugs, have at least one serious mental illness.[8] Similarly, a person who experiences manic episodes from an illness like bi-polar disorder has a 14.5% greater chance of abusing alcohol or drugs than the average individual.[9]

---

[7] Dave Hekel, Seneca County Mental Health Director, as reported in Finger Lakes Times, May 21, 2004.

[8] Darrel.A. Regier, et al., Comorbidity of mental disorders with alcohol and other drug abuse. Results from the Epidemiologic Catchment Area (ECA) Study, 264 JAMA 2511 (2000).

[9] http://www.nmha.org/infoctr/factsheets/03.cfm

Since the alcohol and substance abuse often effectively mask the underlying disorder, these individuals should receive treatment for both problems in order to recover fully.

Mental health services alone are usually not effective in assisting patients who have both afflictions, i.e., those with a "dual-diagnosis." Conversely, research shows that when consumers with a dual-diagnosis successfully overcome alcohol abuse, for instance, their response to mental health treatment improves remarkably.[10]

The policy of New York should be to encourage adequate coverage for alcohol, chemical and substance abuse. Unfortunately, a mental health parity bill which does not require coverage for these abuse disorders will likely leave a large percentage of New Yorkers suffering unnecessarily with untreated and severe mental illnesses.

7. By "Sunsetting" on December 31,2007, There is Not Sufficient Time To Implement the Expanded Mental Health Benefits, Or Study Its Impact

S. 7296-A would take effect on January 1, 2005, and expire on December 31, 2007. This does not provide ample time to implement the expanded mental health benefits, or study the impact of the new Law.

While the Association believes that no "sunset" should be included in this Law, we support the provisions for a study of the impact of the Legislation. If there is going to be a sunset, there needs to be enough time for meaningful implementation, and meaningful study, and the Senate's three-year time frame for both is unrealistic.

The Association suggests that, if there must be a sunset, that it be at least **five years** from the effective date of the Legislation. This will provide ample time for implementation to take hold, and for a meaningful study of the impact of the legislation.

Moreover, it is important that the study of the impact of the bill deal with the widest possible spectrum of issues, including the costs and benefits, the impact of the provision of the newly available mental health services on productivity, the ways that employers and insurance companies have implemented the law, and especially whether or not they have reduced other benefits in order to fund the required enhanced coverage. Particularly important in the latter issue is whether or not mental health benefits to non-covered individuals--those without the required diagnoses--were reduced in response to the enhanced coverage.

When the Federal parity legislation was enacted several years ago, it prohibited dollar limitations on benefits. However, many insurance companies evaded this requirement by enacting visit

---

[10]http://www.nami.org/Content/ContentGroups/Helpline1/Dual_Diagnosis_and_Integrated_Treatment_of_Mental_Illness_and_Substance_Abuse_Disorder.htm

limitations. Whether similar undermining of the intent of the legislation occurs in New York is, given this history, a relevant item of study.Thank you for providing the Association of the Bar of the City of New York with this opportunity to provide comments to the proposed S. 7296-A.

Respectfully submitted,

Katharine A. Clemens, Esq.
Chair
Committee on Mental Health Law