REPORT ON LEGISLATION BY THE
LEGAL PROBLEMS OF THE AGING COMMITTEE

A.9007-B / S.8007-B (Budget Article VII) – Part N

Part N of the 2022-23 New York State Executive Budget for Health and Mental Hygiene makes statutory changes necessary to eliminate the Medicaid resource test and raise the Medicaid income level for vulnerable older adults and adults with disabilities.

THIS BUDGET PROVISION IS APPROVED

On behalf of the New York City Bar Association (the "City Bar") we write to express our support for, and urge the New York State Legislature to adopt, Part N of the 2022-23 New York State Executive Budget Article VII bill for Health and Mental Hygiene. Part N will create greater equity in the Medicaid eligibility rules by aligning Medicaid eligibility limits for older adult New Yorkers and adult New Yorkers with disabilities with those that apply to single adults, childless couples, and families under the Affordable Care Act ("ACA").

These changes will improve continuity of coverage for Medicaid beneficiaries as, currently, a New Yorker on Medicaid who turns 65 or becomes eligible for Medicare as a result of disability must meet a lower income threshold and an asset test in order to continue Medicaid coverage. These changes will also ensure greater access to healthcare and services for older adults and adults with disabilities as Medicaid provides financial protection from health and long term care costs including costs remaining after, and those simply not paid by, Medicare or other health insurance coverage. Such costs are known to deter older adults from seeking needed care.[1]

In order to further the goal of greater equity in the Medicaid eligibility rules, Part N would amend the law as follows:

[1] About 1/3 of older adults in NYC have no dental coverage. 12% report skipping a prescription fill due to cost, and 6% report foregoing medical care altogether due to cost. Chronic conditions like diabetes and high blood pressure are more common among people of color in NYC. *See* Greer S, Adams L, Toprani A, Hinterland K, Dongchung TY, Brahmbhatt D, Miranda T, Guan QX, Kaye K, Gould LH. Health of Older Adults in New York City; 2019; 1-32. Available at https://www1.nyc.gov/assets/doh/downloads/pdf/episrv/2019-older-adult-health.pdf (All sites last visited March 16, 2022).

- Raises the income test to 138% FPL[2]—while leaving in place the ability to shelter income in supplemental needs trusts, pooled income trusts, and ABLE accounts—for:

    - Older adults and adults with disabilities.

- Eliminates the asset test—while leaving in place the home equity limit for people in need of long term care both in the community and in nursing homes—for:

    - Older adults and adults with disabilities, and their spouses;

    - Adults with disabilities who are employed and enroll in the Medicaid Buy in For Working People with Disabilities, and their spouses; and

    - Older adults and adults with disabilities who live in nursing homes, and their spouses.

The Committee strongly supports this proposal as essential to NYC's growing older population, which is both racially diverse and increasingly living in poverty. Over 1.1 million residents of NYC are 65 or older. Unfortunately, even as NYC's overall poverty rate has decreased, the poverty rate of older adults has grown, disproportionately among people of color.[3] Poverty is a significant social determinant of health. Increasing the income limit and eliminating the asset test for adults age 65 and over and adults with disabilities will help make health care more affordable for, and therefore improve the quality of life of, thousands of New Yorkers.

I. MEDICAID INCOME LIMIT FORCES VULNERABLE POPULATIONS TO CHOOSE BETWEEN TREATMENT AND LIVING EVEN DEEPER IN POVERTY

Pursuant to the ACA, New Yorkers who are under the age of 65 and not disabled qualify for Medicaid if their income does not exceed 138% FPL. The Medicaid income limit drops to about 84% FPL once they become eligible for Medicare due to age or disability.[4] As a result of this financial "cliff," thousands of people on the lower end of the financial spectrum who once had Medicaid and are managing financially despite living at or below 138% FPL must now "spend down" their monthly income in excess of 84% FPL on medical costs before Medicaid will provide assistance.

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[2] Adults with disabilities enrolled in the Medicaid Buy In for Working People with Disabilities program are protected by a higher income limit of 250% of the Federal Poverty Level (FPL). This program is not available to consumers after age 65.

[3] *New York City Government Poverty Measure 2019: An Annual Report from the Office of the Mayor*, NYC Mayor's Office for Economic Opportunity. See Figure 1.3 on p. 9 and chart on p. 29, https://www1.nyc.gov/assets/opportunity/pdf/21_poverty_measure_report.pdf.

[4] *See* NYS Department of Health GIS 21 MA/25, p. 2 Item 1, https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/21ma25.pdf.

So, for example, under current rules, an older adult NYC resident living on $1,435 per month (approximately 127% of FPL)[5] must spend $500 on medical bills before Medicaid will cover any services that month. While New York does allow older adults and people with disabilities to satisfy their spenddown with deposits to pooled income trusts, pooled trusts take significant work to establish and use, and charge set-up and monthly maintenance fees.[6] For low income individuals the fees and administration procedures cause hardship, and present a hurdle to managing costs of living.

Raising the income limit to 138% FPL would reduce or eliminate the excess income liability for thousands of individuals who have ACA Medicaid and then become eligible for Medicare. This would also simplify access for thousands of others already on Medicaid who are struggling financially. Here are real life examples of two New Yorkers for whom increasing the income limit to 138% FPL will provide immediate relief and continued access to vital Medicaid benefits:

> **Dalila**, age 52, has lived her whole life in Hell's Kitchen, Manhattan. She has lived on $1,411 of monthly Social Security Disability for two years since suffering a devastating stroke that left her quadriplegic and non-verbal. Dalila qualifies for "free" Medicaid under the ACA which pays for 24-hour nursing care so she can continue to live at home. Her daughter Judy, who has become her legal guardian, lives a few blocks away, managing Dalila's nurses and bills, while working two jobs to support herself. Dalila will soon start Medicare and will "fall off the Medicaid cliff" and require a pooled trust, unless the income limit is raised.
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> **Marisol**, age 70, lives in Sunnyside, Queens, with her husband Juan, 67. After Juan developed rapidly progressing early onset Alzheimer's disease a few years ago and retired on disability, he needed 24-hour personal care through Medicaid. The couple live on a combined Social Security of $1,488 per month with help from SNAP and depend on every penny in order to get by. In order to keep all of their income, rather than "spend down" to the Medicaid limit ($1367 for a couple), Marisol had to set up a pooled income trust. But because their income is so low, the pooled trust can only pay the phone/cable bill, which has proven to be a hassle. If the income limit is raised, they will have free Medicaid and can stop using the pooled trust.

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[5] $1,435 per month is a plausible income for at least 140,000 older adults in NYC, disproportionately people of color: about 44% of NYC's 1.1 million older adults identify as White with about 9.5% of them living between 100% and 149% of poverty. The same is true for 16.8% of Latino older adults who make up 21% of the older adult population; 12.2% of Black older adults who make up 22%; and 16.1% of Asian older adults who make up 12%. When including those living below 100% FPL, these numbers climb higher. See, *Aging with Dignity: A Blueprint for Serving NYC's Growing Senior Population*, NYC Comptroller Scott Stringer, Bureau of Policy and Research, March 2017, at 9 – 10 and 14 – 15, https://comptroller.nyc.gov/wp-content/uploads/documents/Aging_with_Dignity_A_Blueprint_for_Serving_NYC_Growing_Senior_Population.pdf.

[6] For steps to create a pooled trust account, *see* http://www.wnylc.com/health/entry/44/.

II. MEDICAID ASSET LIMIT PERPETUATES FINANCIAL INSTABILITY OF VULNERABLE POPULATIONS AND DISCOURAGES THEM FROM SEEKING NEEDED CARE

New York residents who are under the age of 65 and not eligible for Medicare will qualify for Medicaid, subject only to an income limit of 138% FPL. When a person turns 65 years old or qualifies for Medicare because of a disability, not only does the amount of income the individual is allowed to keep drop, but Medicaid also imposes an asset limit of $16,800 ($24,600 for a couple). Asset limits have been shown to drive people in need of medical care to forego care altogether, as they often depend on their savings to meet other non-discretionary needs.[7] Eliminating the asset limit for older adults and adults with disabilities will ensure these consumers continue to seek needed care.[8]

Removing the asset limit also contributes to greater equity, by standardizing the treatment of assets. Under the current eligibility rules, Medicaid beneficiaries can own a primary residence (up to the applicable equity limit) and retirement accounts of any amount, if they are in "payout" status. Many people of color do not benefit from these rules insofar as they are less likely to own exempt retirement funds while any cash savings are counted, regardless of the consumer's intent to use those funds as retirement savings.[9] They are also less likely to own homes.[10] In addition, applicants often do not understand these exemptions and deplete exempt assets anyway. For example, many applicants are surprised to learn they may keep retirement accounts in payout status, and instead cash them in well before seeking help from the Medicaid program, depleting funds needed to support themselves in retirement.[11]

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[7] Audrey Kearney, Liz Hamel, Mellisha Stokes, and Mollyann Brodie, *Americans' Challenges with Health Care Costs*, Kaiser Family Foundation, Dec. 14, 2021, https://www.kff.org/health-costs/issue-brief/americans-challenges-with-health-care-costs/.

[8] Noelle Cornello, Melissa Powell McInerney, Jennifer M. Mellor, Eric T. Roberts & Linsay M. Sabik, "Increasing Medicaid's Stagnant Asset Test for People Eligible for Medicare and Medicaid Will Help Vulnerable Seniors" 40 Health Affairs 12 (2021): 1943–1952.

[9] Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, and Joanne W. Hsu "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances" FEDS Notes (Sept. 28, 2020) Available at https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm.

[10] According to Census Bureau data, at 42.1% homeownership nationwide is lowest among Black Americans. After white non-Hispanic Americans for whom the home ownership rate is 73.3%, Asian or Pacific Islander American homeownership is at 57.7%. But in NYC, the latter comprise only 14.2% of the population. *See US Census Housing Vacancy Survey, Table 22 Homeownership Rates by Race and Ethnicity of Householder*, https://www.census.gov/housing/hvs/data/ann19ind.html; *see also, QuickFacts: New York City, New York*, https://www.census.gov/quickfacts/newyorkcitynewyork. *See also*, Jason Stauffer, *The Black Homeownership Gap is Larger Than It Was 60 Years Ago. COVID Made It Worse*, Time (Apr. 26, 2021), https://time.com/nextadvisor/mortgages/what-is-black-homeownership-gap/.

[11] An opposing view to eliminating the asset test is the fear of later cuts to the Medicaid program, particularly services, due to increased interest in the program from those with high assets. However, cutting services is not simple; it requires State legislation, and Federal approval, all of which entails opportunity for comment in the future should this concern be substantiated.

Current Medicaid rules for older adults and adults with disabilities exempt a number of assets, in addition to the primary residence and retirement accounts based on the premise that counting those assets is contrary to public policy. Practically speaking, this means that when one applies for Medicaid officials must comb through consumers' documents to tally up their assets, determine which assets are exempt, and then subtract those assets out before reaching an eligibility determination. Enforcement of asset limits is costly for the State, and document production to prove compliance is burdensome for applicants/recipients; raising or eliminating the asset test may save the State money by lowering administrative expense.[12] Relatedly, aligning the Medicaid rules as proposed will likely streamline and make less burdensome the redetermination process for those transitioning off of ACA Medicaid.

Finally, elimination of the asset test would align Medicaid with three other public health insurance programs that support older New Yorkers: EPIC, the State's Pharmacy Assistance Program for people age 65 and over, the Medicare Savings Program which pays the Medicare Part B premium ($170.10 per month in 2022), and the EISEP home care program for those not eligible for Medicaid. New York has also eliminated the asset test for most SNAP beneficiary households earning less than 200% FPL.

III. CONCLUSION

In conclusion, the Legal Problems of the Aging Committee of the New York City Bar Association supports the inclusion of Part N in the final budget.

Legal Problems of the Aging Committee
Peter Travitsky, Chair

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[12] Noelle Cornello, Melissa Powell McInerney, Jennifer M. Mellor, Eric T. Roberts & Linsay M. Sabik, "Increasing Medicaid's Stagnant Asset Test for People Eligible for Medicare and Medicaid Will Help Vulnerable Seniors" 40 Health Affairs 12 (2021): 1943–1952.