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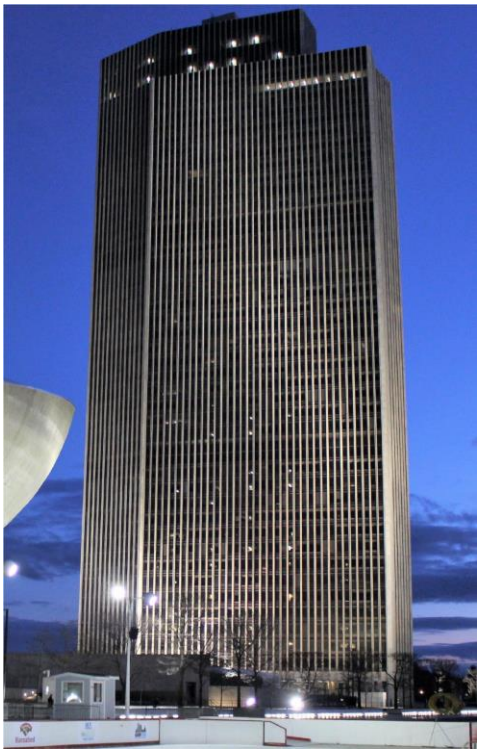

PLUGGED IN TO HEALTH

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Healthcare & Policy Coverage Across New York State

February 19, 2021

2021 -22 Executive Budget Amendments

On February 18, Governor Cuomo released formal amendments to the 2021-22 Executive Budget, referred to as "30-day amendments". The next steps in the budget process include the revenue consensus by March 1 and the one-house legislative budget proposals to be released in mid-March.

The Governor's 30-day amendments include the following amendments and proposals impacting the health care industry:

- **Monetary Penalties for PHL Violations.** The Governor proposes to increase the civil monetary penalties for a general violation of the Public Health Law from the current $2,000-$10,000 range per violation to $10,000 for an initial violation; $15,000 (per violation) for a subsequent violation (if it was the same violation found within 12 months) and $25,000 per violation, if the violation directly resulted in serious physical harm to a resident. "Willful" violations are also each subject to a $25,000 penalty. The proposal authorizes the Commissioner to use amounts collected in excess of $15,000 to be used for initiatives that are likely to improve the quality of care or quality of life of patients or residents at hospitals, nursing homes, home care or hospice, including surveillance and inspection activities, training and education of provider staff, and improving the performance of poorly performing providers.

- **Monetary Penalties for Adult Care Facilities.** The Governor proposes to increase the civil monetary penalties for regulatory violations by ACFs from the current amount of up to $1,000 per day to up to $10,000 per day and eliminates the existing ACF "rectification" process, which provides an operator with 30 days to correct less serious violations before the imposition of a penalty.

- **Nursing Home Independent Quality Monitors.** The Governor proposes to require that nursing homes contract with an independent improvement organization or quality monitor where, in two consecutive inspections (regardless of the timeframe between the inspections), a facility has been issued more than one deficiency citing violations of infection control requirements. The monitor or improvement organization

would be selected by the Department and paid for by the facility to assess and resolve infection control deficiencies, including establishing new infection control policies and procedures. In addition, the proposal extends the authority of the Department of Health to require nursing homes to contract with an independent quality monitor to include a group of nursing homes.

- **Nursing Home Minimum Staffing Expenditures and "Excess Revenue".** The Governor proposes a number of revisions which are designed to address staffing related issues. Specifically, the Governor proposes to establish a requirement for nursing homes to spend a minimum of 70% of revenue on "direct resident care", and a minimum of 40% of revenue on "resident-facing staffing". Amounts spent on resident-facing staffing is to be included in the amounts spent on direct resident care. Effective January 1, 2022, 15% of the costs of associated with utilizing contract staff will be deducted from the amounts calculated for spending on direct resident care and resident-facing staff. The proposal also requires DOH to develop regulations that would require facilities for which the total operating revenue exceeds total operating and non-operating expenses by more than 5%, or which fail to meet the minimum spending requirements on direct care staff, to spend the excess revenue on direct care staffing by October 1 of the following year. In the event these funds are not spent according to the regulation, the facility would be required to return the amounts to the State.

Definitions are provided for the following terms:

"Revenue" is defined as total operating revenue from all sources.

"Expenses" is defined as all operating and non-operating, before extraordinary gains, except as expressly excluded by regulation or law. Exclusions include, but are not limited to, (i) any related party transaction, to the extent such the value of such transaction is in excess of fair market value; and (ii) compensation for employees who are not actively engaged in or providing services at the facility.

"Direct Resident Care" is defined as excluding, at a minimum, and without limitation, capital depreciation, rent and leases, fiscal services, and administrative services. The term is otherwise undefined.

"Resident-facing Staffing" is defined as including all staffing expenses in the ancillary and program services categories, on exhibit "h" resident care reports as in effect on February 15, 2021, as revised by the commissioner by emergency regulation.

The Governor's proposal differs slightly from current Senate and Assembly proposals. The Senate's bill also mandates a minimum of 70% of revenue on direct resident care, which includes a minimum of 40% of revenue on resident-facing staffing, but does not define those terms. Further, the Senate bill does not include limitations on contract staffing. The Assembly bill has not yet been introduced, but it is our understanding that it would require a three year phase in of a 90% spending requirement on direct resident care.

- **Nursing Home Management Salary Cap**. The Executive proposes to establish a cap on the salary for any executive or managerial position which does not involve direct resident care to an amount limited by regulation based on the number of beds at a facility, provided that the salary cannot exceed $250,000 annually. The provision further caps the total amount that facilities may spend on executive and managerial salaries to no more than 15% of expenses.

- **Nursing Home Disclosures.** The Executive proposes to require nursing home operators to publicly post the following information: (1) the maximum rates to be charged for facilities and services; (2) all owners; (3) the name and business address of any landlord of such facility's premises; and (4) provide a summary of all contracts for goods and services for which the facility pays any portion of Medicaid or Medicare funds within 30 days of the execution of such contract.

- **Nursing Home Emergency Receivership.** The Executive proposes to authorize the Commissioner of Health to appoint an emergency receiver upon 24 hours' notice to the operator of a facility upon a determination that public health or safety is in imminent danger or that there exists any condition or practice, or pattern, that poses imminent danger to the health or safety of any resident of such facility. The emergency receiver shall serve until a final determination has been made upon an order to show cause, provided that an application for such order must be made within 30 days of the appointment of the emergency receiver.

- **ACF Temporary Operator.** The Governor proposes to amend the existing statute authorizing the Commissioner to appoint a temporary

operator in ACFs by removing the requirement that the violations seriously endanger the life, health or safety of a resident, and would allow for a temporary operator to be appointed for violations that endanger life, health or safety.

- **Certificate of Need Applications.** The Governor proposes to amend the requirements for establishment applications for residential health care facilities, including change of ownership applications, to include information pertaining to staffing, the source of staffing, and staffing skill mix.

- **Family Planning Services.** The Executive cuts $4.6 in allocations provided to specific providers to support the loss of federal Title X funding due to changes in the federal rules governing the program that forced these providers to stop participating in the program and reallocates the funds to the general family planning appropriation. Overall funding for family planning services remains level at $40.6 million.

- **Licensure for Integrated Comprehensive Outpatient Services.** The Governor amends the proposal contained in the Executive Budget related to Comprehensive Outpatient Service Centers to clarify that no provision shall limit the volume of primary care, mental health, and addiction services that may can be provided under such integrated licensure.

- **NYSHIP Amnesty.** The Governor proposes to reinstate for FY 21-22 the authority for the President of the Civil Service Commission to establish an amnesty period, to provide certain protections for employees who voluntarily identify ineligible dependents. While the coverage of the ineligible dependent would be terminated and the employee would not be able to claim refunds for premiums paid, NYSHIP would not seek recovery of claims paid and the employee would not be subject to any disciplinary, civil or criminal action as a result of the coverage of the ineligible dependent during the amnesty period.

- **COVID-19 Extraordinary Relief Fund**. The Executive proposes to establish a "COVID-19 extraordinary relief" fund (the fund) in the joint custody of the NYS Comptroller and the Commissioner of Taxation and Finance consisting of revenues derived from any chapter of law enacted during FY 21-22 which: (i) impose a new tax; (ii) impose an increased rate of tax; and/or (iii) diminish or eliminate any tax deduction or credit in effect as of 3/31/21. Monies in the fund could be distributed as grants or loans to school districts, local governments, for profit and not for profit corporate entities, and/or public benefit corporations to support urgent

expenses related to COVID-10 emergency extraordinary hardships. Payments from the fund have to be made pursuant to a plan subject to Budget Director Approval and filed with the Chairs of Assembly Ways and Means and Senate Finance 30 days prior to expenditure. The proposal further authorizes the Comptroller to transfer monies to the State's general fund in the event of an economic downturn, which would be determined based on a composite index of business cycle indicators. If the composite index declines for five consecutive months, transfers to the general fund may be authorized in amounts necessary to meet the requirements of the State's financial plan. Transfers to the general fund would have to be notified to the Speaker of the Assembly, the Temporary President of the Senate and the Minority Leaders of the Assembly and Senate. The Aid to Localities appropriation bill includes $3B for distribution of loans/grants for this purpose, provided the final budget enacts an identical version of the language, as proposed by the Executive.

- **DFS Insurance Program Funding.** The Executive proposes to reduce funding for the Insurance Program by $700,000 by reducing the suballocation for the Healthy NY Program in the same amount to $15,700,000.

- **Physicians Excess Medical Malpractice Program.** The Executive adds a reappropriation for the Program to allow use of a portion of the FY 2021 undisbursed appropriation ($52,550,000) in FY 2023.

- **Developmental Disabilities Planning Council.** The Executive amends the membership of the Council to include specific ex officio members of the Council and at least 60% of the members appointed by the Governor to consist of developmentally disabled persons or their parents or guardians.

- **Medical Indemnity Fund.** The Governor proposes to amend the Medical Indemnity Fund reimbursement to clarify that previously authorized custodial care must be provided within a residential health care facility. The Governor's amendments further prohibit a parent or legal guardian who is legally mandated to provide care for the medically fragile child from becoming a qualified health care provider under the MIF. Last, the Governor's proposal limits reimbursement for services where there are no usual and customary rates to 130% of Medicaid or 100% of Medicare reimbursement, whichever is higher.

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