

February 25, 2018

TO: OFFICERS, COUNCILORS, AND TRUSTEES

FROM: GREGORY PINTO, MD
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MOE AUSTER
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RE: REPORT FROM THE DIVISION OF GOVERNMENTAL AFFAIRS

ALBANY - Legislative

MSSNY Delivers Testimony Highlighting Positives And Negatives Of New York State Budget Proposal

MSSNY Senior Vice President and Chief Legislative Counsel Moe Auster delivered testimony on February 5 to a joint Senate-Assembly Committee regarding the healthcare portion of Governor Cuomo's proposed 2019-20 budget. MSSNY's testimony applauded the several positive measures included within the budget that MSSNY believes will help physicians provide better care to New Yorkers, while also highlighting a list of issues deemed problematic to the medical community and their patients.

To view MSSNY's testimony and the several questions from legislators, [Click here](#). To read MSSNY's written testimony, [Click here](#).

Of note, MSSNY's testimony noted its support for NYS Executive Budget measures that would: increase the tobacco/e-cigarette purchase age to 21, provide better coverage of care for mental illness and substance abuse treatment, examine ways to prevent maternal mortality, provide stronger regulation of pharmaceutical benefit managers (PBMs) and extend the Excess Medical Malpractice Insurance program to assist physicians in affording extraordinarily expensive but needed liability insurance coverage.

MSSNY's testimony also expressed strong concerns with proposals that would legalize the non-medicinal use of marijuana, revoking from doctors the final say in coverage for prescribing medications to their Medicaid insured patients and expansion of the types of practitioners who could treat Workers Compensation patients without addressing the numerous factors that are deterring physician participation in this program. He particularly highlighted the physician community's strong concerns with a proposal that would significantly cut (an estimate \$80 per patient cut) the patient deductible payments that Medicaid makes to physicians who treat patients dually eligible for Medicare and Medicaid.

Mr. Auster answered a variety of questions from the legislative panel, including the physician perspectives on the legalization of non-medicinal marijuana; the regulation of pharmaceutical benefit managers, and perspectives on single payer legislation.

Physicians Urged To Oppose \$80/Dual Eligible Patient Cut

Physicians are urged to continue to contact their state legislators to oppose a proposal in the 2019-20 Executive Budget that would significantly cut payments that Medicaid makes to

physicians to cover the Medicare Part B deductibles of their patients covered by both Medicare and Medicaid. You can send a letter in opposition to this harmful proposal by clicking here: <https://cqrcengage.com/mssny/app/write-a-letter?11&engagementId=495714>

You can read MSSNY's memo of opposition to the Legislature here:

<https://www.mssny.org/Documents/2019/Governmental%20Affairs/State/2019%20Memos/Budget%20Dual%20Cut%20-%20Oppose.pdf>

While the exact cut for each physician would depend on the physician's patient mix and services provided, we estimate that the cut would be \$80 per patient. That is because the 2019 Medicare Part B deductible is \$185, and studies show that on average Medicaid only pays 56% of the Medicare fee schedule in New York.

Given that there are hundreds of thousands of patients in New York who are dually eligible, for practices that see a large number of dual eligible patients, this will have a profound impact. For example, if a physician's patient mix includes 500 such dual eligible patients, which could certainly be the case for many types of specialty physicians, it would cut payments by \$40,000 per year. Funds that could go toward upgrading electronic health records, hiring additional staff to allow for more time with patients, upgrading facilities or other medical equipment. In past years, physicians have had to absorb significant cuts from Medicaid for the care that they provide to their senior and disabled patients covered by both Medicare and Medicaid, making it much harder for these physicians to deliver community-based care. Please urge your legislators know how unfair this cut is. Please urge them to oppose balancing the state budget on the backs of dedicated community physicians seeking to deliver quality care to their patient.

Governor Releases "30-Day" Budget Amendments Impacting Medicaid Payments

On February 15, Governor Cuomo provided the State Legislature with his 30-day amendments to the Executive Budget proposal. While staff is continuing to review the entire proposal, there are major implications for the health care sector that are designed to close a \$2.3 Billion budget gap for FY 2019-20. Of significant concern is a proposal that would impose an across the board Medicaid cut to all covered Medicaid providers totaling \$190 million. This could translate to a per service cut to physicians and other health care providers of approximately 0.8%. Moreover, there were significant cuts to hospitals and nursing homes announced including the proposed elimination of a scheduled \$550 million increase in Medicaid payments that had been announced in late 2018. Furthermore, the Governor proposed a revised version of an opioid tax on manufactures and distributors that had been approved by the State Legislature as part of last year's Budget, but had been struck down by the courts. The governor has also proposed re-convening the Medicaid Redesign Team (MRT) that had met in the early years of the Cuomo Administration to arrive at ways to increase quality care delivery and produce savings for the system. Please remain alert for further updates on these issues.

NYS Reproductive Health Act: Governor Discusses Aspects of the Law

The New York State Legislature passed the Reproductive Health Act and it was immediately signed into law by Governor Andrew Cuomo as Chapter 1, Laws of 2019. The law amended the public health law by codifying the abortion procedure within New York State's public health law and removing it from the penal law. The same provisions found in *Roe v. Wade* remain in same. The law creates a statement of purpose and says that an abortion may be performed by a licensed, certified or authorized practitioner acting within their defined scope of practice under Title 8 of the Education Law.

Under the new law, an abortion can be performed:

- a) within 24 weeks from the commencement of pregnancy;
- b) at any time, where there is an absence of fetal viability; or
- c) at any time, when necessary to protect the patient's life or health.

While New York's new law has been the subject of much national attention, many have commented that it is consistent with previous Supreme Court holdings on this issue. For example, Gov. Andrew Cuomo wrote an op-ed about the law in the NY Times, which can be found [Here](#).

MSSNY has a long standing policy that opposes the criminalization of the exercise of clinical judgement in the delivery of medical care. Moving the abortion procedure from the State Penal law to the Public Health Law is consistent with this position. The law does not expand the current scope of practices for health care providers. It does, however, specify that health care practitioners can perform an abortion if it is otherwise enabled by their current scope of practice as defined under the NYS Education Law. Nurse practitioners are allowed to perform a medicated abortion procedure already under their scope of practice. However, nurse practitioners' scope does not include surgery and cannot perform a surgical abortion. [The American College of Obstetricians and Gynecologists \(ACOG\)](#) District II and the [NYS Academy of Family Physicians \(NYAFP\)](#) supported this measure. MSSNY will be closely monitoring the implementation of the new law to assure health care practitioners are acting within their scope.

NYS Senate and NYS Assembly Advance Bill Mandating Patient Education for C-Section; Physician Action Urged

Senate Bill 2888/A.318, sponsored by Senator Julia Salazar and Assemblymember Amy Paulin, has advanced to the Senate calendar after being reported from the Senate Women's Issues Committee by a 4-2 vote with one additional Senator voting without recommendation. The measure would require all physicians and other health care providers to provide all maternity patients with written information as to the risks associated with Cesarean section. This measure has already passed the NY State Assembly. The Medical Society of the State of New York & ACOG are opposed to this measure as it interferes with the physician patient relationship by requiring a written communication to every single pregnant woman whom the physician recommends a C-Section. MSSNY, the NYS Academy of Family Physicians & ACOG are concerned that an individual patient may have different risk factors and health needs. Furthermore, the terminology of the bill is not consistent with the typical medical practice. The Medical Society is also troubled by the proliferation here in New York State, and nationally, calling for legislation requiring educational information that physicians will need to cite that pertains to women's health issues. Nationally, a disproportionate number of these bills apply only to physicians when they are treating pregnant women. Furthermore, states have gagged or coerced physician communications for politicized public health issues. This measure mandates physicians to provide a script that may not comply with the latest medical evidence on Cesarean section. Physicians are urged to contact their Senate members and urge defeat of the bill. Senate members can be reached through the main senate switchboard at (518) 455-2800 or by sending a letter through the MSSNY Grassroots Action Center [here](#).

Legislators Advance Legislation Aimed at Preventing Maternal Deaths

Legislation (S.1819, Rivera/A.3276, Joyner) advanced from the Senate Women's Issues Committee, and from the Assembly Health and Codes Committees, that would establish maternal mortality review boards and the maternal mortality and morbidity advisory councils for

New York State and New York City. The goal of S1819/A3276 is to gather and review information related to maternal deaths and illness, to disseminate their findings and to develop recommendations and best practices to improve maternal health in New York. The legislation also provides needed confidentiality protections regarding the board's proceedings and requires the Board to report on its aggregate finding and recommendations. MSSNY working together with the American College of Obstetricians & Gynecologists (ACOG) is in support of this legislation and strongly backs its goal of improving health outcomes in New York.

Medical Liability Reform Bills Introduced In The Assembly

Assemblymembers Robin Schimminger (D-Kenmore) and Peter Abbate (D-Brooklyn) each re-introduced legislation aimed at reducing the exorbitant cost of medical liability insurance in New York State, and providing more fairness in the resolution of the cases.

In New York, cumulative medical liability payouts far outpace other states. A recent report by Diederich Healthcare showed that, in 2017, once again New York State had far and away the highest number of cumulative medical liability payouts. Claimants in New York were awarded nearly two times more than the state with the next highest amounts, Pennsylvania, and payments in New York far exceeded states such as California and Florida. Moreover, New York had the dubious distinction of having the highest per capita medical liability payouts in the country, about 500% greater than the State of California, which has enacted meaningful liability reforms.

Assemblyman Schimminger's Medical Liability Reform Act (A.4897) would work to ease the extraordinary liability burden on physicians in New York through the enactment of a number of policy changes, including the following:

- Requiring an affidavit of merit from a NY licensed physician to cut down on the filing of non-meritorious claims;
- Placing a reasonable limit on non-economic damages (there are currently 30 states with some form of a similar cap); and
- Requiring enhanced disclosure of identity of expert witnesses

Assemblyman Abbate's legislation (A.5018) would require a particularized affidavit of merit to function as a comprehensive vetting of medical malpractice claims prior to commencing of a legal action. Additionally, it would require full and complete discovery of expert witnesses in medical liability actions.

MSSNY Fights for Funding to Attract and Retain Physicians in NYS

MSSNY staff joined representatives from a variety of other health care advocacy groups (including HANYS, NYACP, CHCANYS, the Center for Health Workforce Studies & the Upstate NY Physician Recruiter Network) in numerous meetings with key legislative and executive staff to support increased efforts to address the shortage of physicians in underserved regions across New York State. In addition, two physicians who are Doctors Across New York (DANY) awardees joined the group and shared their stories about how DANY positively affected their lives and ability to practice in New York. Among the notable issues was the request of legislative support of funding for DANY. DANY is a state funded program launched in 2008 that aims to train and place physicians in areas of New York State where that specialty is most needed. The goal is to ensure adequate funding, streamline the application process and to remove barriers to application. The group is also hoping for increased funding for the Empire Clinical Research

Investigator Program (ECRIP) which allows doctors to spend additional time training in research.

Other priorities for the group include funding for the Diversity in Medicine Scholarship; the expansion of the Take a Look Program, which introduces medical students and residents practicing in NYC to Upstate New York and the opportunities available in medicine; and statutory implementation of required data collection for allied health workers.

Senator Rivera Introduces Legislation to Improve Patient Access to be Treated by the Physician of Their Choice

Senator Gustavo Rivera, Chair of the New York State Senate Health Committee, introduced three bills strongly supported by MSSNY. The bills in question relate to health insurance networks and the interaction between physicians and insurance companies.

- S3461 would require that health insurers cover services provided by out-of-network (OON) providers. OON coverage is not mandated in New York and while exchange officials have %strongly encouraged+insurers to offer this coverage, many New Yorkers do not have this option available.
- S3462 would allow in limited instances independently practicing physicians in New York State to conduct some collective negotiations by creating a system under which the state would closely monitor those negotiations, and approve or disapprove such negotiations from going forward. Many areas of New York are dominated by a small number of insurers and this bill would help even the playing field between physicians and insurers.
- S3463 would provide physicians due process protections when health insurers seek to terminate a physician from its network by failing to renew the physician's contract. Current law prohibits a health insurance company from terminating a physician's contract without a written explanation of the reasons for the proposed contract termination and an opportunity for a hearing by a panel comprised by three persons including a clinical peer in the same or similar specialty. These provisions, however, do not apply to situations involving the non-renewal of physician contracts. This bill would correct that disparity.

ALBANY - Regulatory

New York State insurance exchange reports record enrollment numbers

NY State of Health's open enrollment period ended on January 31, and at that time enrollment in both the Essential Plan and in Qualified Health Plans had increased over last year. Essential Plan enrollment stood at 790,152, up 6.9% over last year meanwhile 271,873 people had purchased Qualified Health Plans, a 7.4% increase compared to the same point last year. In contrast, enrollment dropped by 3.8% in the 39 states that use the federal marketplace. The Essential Plan provides coverage with no deductible and is either free or costs \$20 monthly. A family of four earning up to \$50,200 qualify and New York and Minnesota are the only two states to offer this option. According to the Kaiser Family Foundation, the monthly premium for the cheapest individual bronze Qualified Health Plan in NY averages \$402 without subsidies and the cheapest gold plan averages \$638 per month. NYSOH has stated that 58% of people buying plans qualify for financial assistance.

NYS DOH Sends Letter To Physician Regarding Opioid Prescribing

The New York State Department of Health, Bureau of Narcotic Enforcement, has sent a letter to physicians and institutions apprising them that, effective April 1, 2018, legislation was enacted that no opioids shall be prescribed to a patient initiating or being maintained on opioid treatment for pain which has lasted more than three months or past the time of normal tissue healing, unless the medical records contains a written treatment plan that follows generally accepted national professional or governmental guidelines. This requirement does not apply for patients who are being treated for cancer that is not in remission, in hospice or end of life care, or whose pain is being treated as part of palliative care practices. MSSNY took no position on this measure as it was consistent with the CDC's Chronic Pain guidelines, and was an improvement from an earlier version that would have required a written treatment plan for pain lasting longer than 30 days. A copy of the letter from BNE is at:

<http://www.mssnyenews.org/wpcontent/uploads/2019/02/Treatment-Plan-Letter-190213.pdf>.

Information on the CDC's Chronic Pain Guidelines is at:

<http://www.mssnyenews.org/wp-content/uploads/2019/02/Chronic-Pain-Guidelines.pdf>

NYS DOH Issues Emergency Regulations on PTSD, Substance Abuse and Opioid Use Disorder

the NYS DOH recently re-issued emergency regulations adding PTSD, substance abuse and opioid use disorder to the list of conditions to be treated by marijuana consistent with statutes enacted in 2018 authorizing medical marijuana to treat these conditions. DOH had previously issued an emergency regulation on this subject last October.

MSSNY has opposed adding these conditions to the list of medical conditions that a physician and/or other health care provider can certify a patient for use of marijuana. However, importantly, these updated emergency regulations now require that any provider making a recommendation for marijuana for the treatment of opioid use disorder must have a DATA 2000 waiver. This regulation appears to limit when marijuana can be used and assures that only those who have appropriate training can make the decision. A copy of the emergency regulations can be found on pages 7-9 at the NYS State Register:

<https://docs.dos.ny.gov/info/register/2019/feb20/rulemaking.pdf>

MSSNY remains concerned about using marijuana for substance or opioid use disorders. A recent JAMA article highlights the concern of substituting marijuana in place of buprenorphine. <https://jamanetwork.com/journals/jama/fullarticle/2723649> The article concluded "For the opioid addiction crisis, clearly efficacious medications such as methadone and buprenorphine are under prescribed. Without convincing evidence of efficacy of cannabis for this indication, it would be irresponsible for medicine to exacerbate this problem by encouraging patients with opioid addiction to stop taking these medications and to rely instead on unproven cannabis treatment.

Workers Compensation Board Looks at Improvements to the IME Process

This New York Workers Compensation Board IME Advisory Committee began meeting in early February. Among the members of the WCB expert panel was MSSNY Past-President Dr. Robert Goldberg. The group was created pursuant to a provision of the comprehensive Workers Compensation legislation enacted in 2017 that called on the WCB to make recommendations for improving the process by which injured workers receive independent medical examinations. In particular, the statute calls upon the Board to develop recommendations that will ensure fairness, and highest medical quality, while improving methods of combatting fraud. For example, one of the major discussion points for the initial

meeting was examining data that a small number of practitioners had performed an enormous number of IMEs. The group will be meeting throughout 2019 to develop recommendations for improving the IME process with a report due to the Governor & Legislature by year end.

WASHINGTON

MSSNY Physician Leaders Advocate for the Profession and Their Patients in the Nation's Capitol

Several MSSNY physician leaders and staff traveled to Washington DC for meetings with many of the members of New York's Congressional delegation. Physicians advocated for several measures to improve and preserve patient access to needed physician care, including:

- Assuring that any surprise medical bill+law enacted on the federal level is consistent with New York's comprehensive law which has become a model for the country;
- Preserving seniors' access to needed care through increases to the Medicare fee schedule to keep up with practice cost inflation;
- Reducing the hassle factor associated with participation in the Medicare MIPS program and assuring EHR interoperability;
- Lifting the DEA Schedule 1 classification of marijuana so that necessary research can be performed on potential medicinal benefits.

Among the attendees included: MSSNY President and Medina internist Dr. Tom Madejski; MSSNY Immediate Past-President and Long Island ophthalmologist Dr. Charles Rothberg; MSSNY Councilor and Schenectady ophthalmologist Dr. John Kennedy; Erie County Medical Society Past-President, AMA Council on Legislation Chair and Roswell Park urologist Dr. Willie Underwood; MSSNY Councilor and Queens Emergency Department Physician Dr. Carlos Zapata; MSSNY Legislative & Physician Advocacy Committee Vice-Chair Dr. Rose Berkun, Oswego Family practice physician Dr. Corliss Varnum; medical student Usman Aslam; and MSSNY staff. The meetings were in conjunction with the American Medical Association's annual National Advocacy Conference, where physician across the country come to Washington to meet their respective members of Congress

MSSNY, AMA and Medical Societies Fight To Assure Fair Resolution Of Surprise Medical Bills Issue

Led by United States Senator William Cassidy, MD (R-LA), the US Senate has been examining proposals that would address surprise out of network medical bills faced by patients in hospitals, usually the result of being treated by an out of network specialist in the emergency department or other unanticipated care.

Many believe that this is one of the only health care issues in the current Congress that has bipartisan support.

To that end, MSSNY has written to the New York Congressional delegation, urging that any legislation to be considered is consistent with New York's comprehensive law on the subject enacted in 2014 (see MSSNY's letter here: http://www.mssnyenews.org/wp-content/uploads/2019/02/0349_001.pdf). New York's comprehensive law addressing this issue has been hailed as a model for the rest of the country because of the delicate balance it struck among key health care stakeholders (such as physicians, hospitals and health insurers) to protect patients from large surprise+medical bills, while at the same time being constructed in such a way that it did not adversely affect the ability of hospital emergency departments to have adequate on-call specialty physician care.

In addition, MSSNY has also joined on to a federation of medicine letter to the US Congress initiated by the American Medical Association along with over 60 other national specialty societies and over 40 other state medical societies urging that the any legislation to be considered by Congress meet a series of key principles. These principles recognize the multitude of factors that can lead to patients facing unanticipated out of network medical bills: including assuring health insurers maintain robust physician networks, assuring health insurers maintain accurate provider directories; assure patients are kept ~~%~~ out of the middle+, and assure that any guidelines or limits on what out-of-network providers are paid should reflect actual charge data for the same service in the same geographic area from a statistically significant and wholly independent database, and not be based on Medicare or in-network rates.