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Skyline news

Reporting on New York's Health Care News

State Legislators Look to Health Care to Close Deficit

Although New York's SFY 2010–11 legislative session was scheduled to conclude June 18, Governor David Paterson extended it to June 28 in order to pass the State's budget, which was due April 1. The Governor warned that if the budget is not passed by June 28, he reserves the right to include budget cuts in any emergency extenders bill passed. Without a final State budget, the Legislature must pass emergency extender bills weekly to prevent a State government shutdown. The Governor has excluded borrowing, refinancing of the tobacco bonds, or deficit financing to close what remains

of the \$9.2 billion deficit. With these potential revenue enhancers off the table, Senate Democratic Conference Leader Senator John Sampson has expressed concern that an increase to the hospital gross receipt tax (GRT) could be part of a final budget agreement.

Health Care Already Targeted The possibility of a GRT increase comes on top of hundreds of millions in health care cuts made earlier this month. In an unprecedented move, Governor Paterson included the entire health

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Senate Saves Docs, Considers FMAP

On Friday, the U.S. Senate passed a bill to protect physicians through November 2010 from a 21% scheduled reduction in Medicare reimbursement rates. The payment reduction actually took effect June 1, but the Centers for Medicare & Medicaid Services (CMS) delayed processing claims to give Congress time to act without it impact-

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SPECIAL INSERT HEALTH REFORM SUMMIT

To read highlights of the June 17, 2010, Health Reform Summit, see this week's insert.



Plaintiff Lawyers Try to Bolster Fees

On the heels of eight rounds of Medicaid cuts to health care providers across New York State, plaintiff attorneys are pressing for the passage of extremely damaging amendments to State laws governing medical malpractice cases. GNYHA, together with 1199/SEIU, is aggressively opposing such amendments, including releasing press statements, sending memos in opposition to every State legislator, and taking out print ads in the *New York Times* and *Albany Times Union*.

Increasing Plaintiff Attorney Fees Top on the list of proposals put forward by the plaintiff attorneys are those that would do nothing more than increase the contingent fees they receive. Such proposals, if adopted, would increase the cost of malpractice coverage for hospitals anywhere from 15% to 40% statewide, depending on the fee increase proposed. The State's current fee limitations were enacted in 1985 as part of a comprehensive package of reforms designed to limit increases in the cost of malpractice coverage. At that time, the Legislature replaced the current one-third

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Fees *continued*

across-the-board fee limit with the current schedule that breaks down a plaintiff's recovery into tiers so that attorneys may receive fees equal to:

- 30% of the first \$250,000 recovered;
- 25% of the next \$250,000;
- 20% of the next \$500,000;
- 15% of the next \$250,000; and
- 10% of those portions of recoveries above \$1,250,000.

Then-Governor Mario Cuomo's memorandum urging the use of a sliding scale stated that fee limits were intended "to assure that the injured party will receive a sufficient share of the judgment and to target insurance premium dollars primarily to the plaintiff's compensation." Although plaintiff attorneys today complain that they somehow deserve an increase in the fee schedule, State law expressly permits them to apply for compensation beyond the schedule when the attorney can demonstrate that the schedule does not provide adequate compensation. In addition, attorneys have most certainly received increases in their fees over the years. The reason for the currently unsustainable high levels of coverage costs is that the severity of recoveries has increased significantly over the years. One group of hospitals located in New York City has indicated that their average indemnity payment per paid claim increased 120% between 1999 and 2007. As a result, plaintiff attorneys received considerable increases in their fees over time as the underlying recoveries to which the fee schedule is applied have increased dramatically. Adoption of any fee increase would be a major and extremely expensive step backwards for New York State, its malpractice resolution system, its providers, and its patients at any time, but particularly when the State has already severely reduced hospitals' Medicaid payments.

Extending the Statute of Limitations An equally damaging proposal pending is one that would amend the State's two and one-half year statute of limitations for malpractice actions, which currently runs from the date of an act or omission, so that it would run from when one knows or reasonably should have known of the negligent act or omission and that the act caused an injury. Such a change would increase hospital malpractice costs in

the range of 15% to 25% statewide, due to increases in the number of lawsuits in general as well as the litigation that would arise from disputes regarding when someone knew or reasonably should have known of a negligent act and that the act caused an injury. New York's statute of limitations for malpractice actions is already one of the longest in the nation. In addition, State law provides for a number of ways in which the statute can be either extended or tolled. While other states may have more generous discovery rules in some cases, those states have more tailored formulations than what has been proposed in New York and the majority of those states also have caps on damages, thus reducing the cost impact of such rules.

Overturing the *Arons* Decision Another proposal would overturn a 2007 New York State Court of Appeals decision that had upheld a malpractice defendant's right to interview, on an informal basis, a plaintiff's non-party treating physicians. In that case, *Arons v. Jutkowitz*, the Court specifically recognized

that formal depositions or even somewhat less formal interviews attended by an adversary's counsel are often no substitute for off-the-record, private efforts to learn and assemble information. In upholding the right of defendants to such informal interviews, the Court based its decision on the legal principle that when patients sue for personal injuries, they bring their medical condition into question and thus waive their physician-patient privilege regarding that condition. The Court also recognized that no party has a "proprietary interest" in any witness and thus gave defendants the same right of access to such witnesses as plaintiffs have. With respect to concerns about the protections afforded by the Health Insurance Portability and Accountability Act (HIPAA), the Court recognized the ability of defense counsel to proceed with informal interviews, provided that HIPAA procedural requirements are met. It is estimated that overturning the Court of Appeals' decision will conservatively increase malpractice coverage costs by 5% statewide. ■

Deficit *continued*

care budget, with \$775 million in yearlong and permanent health care cuts, in the emergency extender bill that passed June 7. This extender amounts to roughly a 50% restoration of the \$561 million in cuts to hospitals the Governor proposed in January. To read details about the cuts, see GNYHA member letter bulletin ML-61 (dated June 8, 2010),

available on www.gnyha.org.

The Governor also signed emergency extender bill for June 16 through June 23 that included more than \$300 million in cuts to mental health and social services. The provisions include downsizing State psychiatric facilities and extending the exemption from licensure requirements for social workers and other mental health professionals to March 31, 2011. ■

SHRPC UPDATE

At its June 10 meeting, the State Hospital Review and Planning Council (SHRPC) approved (in some cases with conditions or contingencies), the following GNYHA member projects: **Long Island Jewish Medical Center**: renovation of 8th & 9th floor replacement bed tower to accommodate 60 additional medical/surgical beds. Total estimated project costs: \$67,722,290. **NYU Hospitals Center** – two projects: **1)** modernization and renovation of the lobby area, to include four new elevators, a patient education and family resource center, and redesign to improve flow of visitors to eliminate overcrowding. Total estimated project costs: \$69,381,500. **2)** renovation and modernization of its emergency department to accommodate existing and projected patient volumes. Total estimated project costs: \$80,823,273. **Catholic Health Services of Long Island**: purchase and fully integrate a new enterprise-wide Electronic Medical Records (EMR) information system that will interconnect its five hospitals. Total project costs are estimated at \$144,281,034. ■

Health Plan Profits Improve in 2009

New York health plan profits increased on an overall basis in 2009, rising to approximately \$1.3 billion, an increase of 30% over 2008. The aggregate total margin rose from 2.6% to 3.2%. However, profits remain well below pre-recession levels, when annual

surpluses averaged \$1.6 billion and the increase in profits was due primarily to investment gains. Aggregate underwriting margins actually decreased from 2.5% in 2008 to 1.8% in 2009. Medical loss ratios (MLR) remained stable at approximately 85%.

Most profitable for the industry was the Medicare line of business—which includes Medicare Advantage and Medicare Part D. Plans reported \$548 million in operating income from Medicare, accounting for .75% of total plan operating income, which was \$731 million. The total operating margin on Medicare was 6%. This can be expected to decrease as Medicare Advantage cuts included in the health reform law are implemented.

Nearly half of the plans did not perform as well in 2009 as in 2008, but others rebounded sharply from big losses. Oxford was again the most profitable plan, with

net income of \$574 million, comparable to the company's 2008 income. Oxford's profit margin was 12%, with investment income accounting for more than half of their profits. Separately, Oxford's parent company, United Healthcare, reported \$80 million in income, a decrease of \$9 million from 2008. Oxford and UnitedHealthcare reported MLR of 83% and 84%, respectively. Empire, the largest plan in the State based on membership, reported \$338 million in net income, down \$35 million. Aetna has reported consistent decreases in enrollment since 2001, and earnings dropped more than half from 2008 to \$47 million in 2009. Performance improved for both GHI and HIP, though GHI reported a loss of \$10 million while HIP turned around an \$87 million loss in 2008 to an \$81 million profit in 2009. Both plans report MLRs above the statewide average. ■

CON Regulatory Reform Update

At its June 10 meeting, the New York State Hospital Review and Planning Council (SHRPC) approved for adoption the State Department of Health's proposed amendments to the State's certificate of need (CON) regulations designed to streamline and reform the CON application and review process. The reform package, which DOH characterizes as its initial phase of CON reform, raises the project thresholds that establish the level of review, reduces the level of review for the acquisition of certain medical equipment, and combines architectural review and prior review into a single category that will be known simply as "limited review." DOH states that the reforms help focus the State's resources on "projects that involve the delivery of highly complex services, the investment of substantial resources, and/or the creation of new facilities or beds." DOH will next publish the reform regulations in the *State Register*, and the regulations will become effective 30 days from their publication. DOH has also been designing an electronic CON application system, which it has named NYSE-CON and which DOH hopes to unveil in part in the fall. NYSE-CON is similarly intended to streamline and expedite the CON application process and to reduce costs and resources for providers and the State. GNYHA will be holding a briefing with DOH on the new CON guidelines in the upcoming weeks. ■

	NET INCOME (in millions)	TOTAL MARGIN	UNDER-WRITING MARGIN	MEDICAL LOSS RATIO
AETNA	\$47	5.7%	5.9%	85%
EMPIRE	\$338	4.1%	3.5%	88%
GHI	\$(10)	-0.3%	-1.2%	90%
HIP	\$81	1.6%	0.7%	88%
OXFORD	\$547	12.4%	6.6%	83%
UNITED	\$80	3.4%	3.6%	84%

DOH Reports on Berger Recommendations

On June 10, representatives of the New York State Department of Health (DOH) reported to the State Hospital Review and Planning Council (SHRPC) on the status of implementation of the recommendations put forward by the Commission on Health Care Facilities in the 21st Century, commonly referred to as

the "Berger Commission." Created by State law and charged with reviewing the State's hospitals and nursing homes for the purposes of "rightsizing" the health care system, the Berger Commission made a series of recommendations in 2006 that affected 57 (or 25%) of the State's hospitals, and 24

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Shelter Placement Changes Take Effect July 1

On June 18, the New York City (NYC) Department of Homeless Services (DHS) met with GNYHA's Discharge Planning Workgroup to train members on the revised placement process for hospital patients being discharged back to the New York City Shelter System, which takes effect July 1, 2010

(note: all relevant forms are available at www.gnyha.org). DHS officials Dr. Dova Marder, Medical Director; Fran Winter, First Deputy Commissioner; George Nashak, Deputy Commissioner, Adult Services; and Felicia Martin, Director of Intake and Diversion, provided the training. Under the new process, hospitals will

be permitted to directly discharge patients back to the shelter system and will no longer need to receive prior approval from the Medical Review Team (MRT) and/or DHS Program Referral Unit (PRU) before discharge.

The shelter placement process changes are being implemented as a direct result of feedback the GNYHA Discharge Planning Workgroup provided DHS at a meeting in January. At that meeting, hospital staff acknowledged the special needs of the homeless population, but also shared their concerns that once admitted to the hospital, homeless patients experienced a longer than necessary length of stay as a result of complex DHS process for authorizing a return to the shelter system. As a result of these changes, hospitals should no longer experience a delay in discharging patients back to the shelter system, while the shelter system will still receive the information necessary to ensure a safe transfer and re-entry to the system. GNYHA will continue to work closely with its membership and DHS to ensure that homeless patients' needs are met for timely post-hospital placement. ■

Berger *continued*

(or 4%) of the State's nursing homes. The recommendations included closure, downsizing, consolidation, conversion, or restructuring of the facilities involved. At the June 10 meeting, DOH reported that 2,810 hospital inpatient beds had been eliminated through 10 facility closures and 47 downsizings, affiliations, conversions, and mergers. An additional 768 beds are pending closure.

With respect to nursing homes, the Berger Commission recommendations have resulted in the elimination of 2,548 nursing home beds through the closure of six nursing homes and 18 downsizings,

reconfigurations, conversions, and affiliations. The elimination of an additional 417 beds is pending the outcome of litigation.

DOH noted that approximately \$550 million in funding for the restructuring of the system has been made available through the State's HEAL NY program. A number of the Berger Commission recommendations have not been implemented as proposed due to various health and access concerns; governing board concerns; construction, logistics or financing related matters; and litigation. DOH noted that the Berger Commission's rightsizing recommendations have created a framework for decision-making with respect to policy, regulation, planning, certificates of need, and funding of services. ■

FMAP *continued*

ing doctors. The cost of the physician fix was offset largely by a measure to tighten the Medicare "72-hour rule," which is estimated by the Congressional Budget Office to reduce payments to hospitals by \$4.2 billion over 10 years mainly by prohibiting retroactive "unbundling" allowed under current rules. The House is expected to consider the measure early next week.

FMAP Also last week, the Senate debated a modified version of the American Jobs and Closing Tax Loopholes Act of 2010, H.R. 4213, which passed the House May 28. Unlike the House, which dropped an extension of the economic stimulus bill's enhanced Medicaid matching rate, or "FMAP" assistance for states before pass-

ing the bill, the Senate Democratic versions have contained this important provision. Under current law, the enhanced FMAP for states expires December 31, 2010. The six-month extension would mean \$3 billion in Federal assistance for New York State and counties, with more than \$1 billion for the State government alone in this current State fiscal year. GNYHA weighed in with New York's Democratic Senators Charles Schumer and Kirsten Gillibrand, urging them to work with Senator Max Baucus (D-MT) and Senate Majority Leader Harry Reid (D-NV) to ensure the extension was included in the Senate version of the bill, which they did. GNYHA is grateful for their support. New York Governor David Paterson, New York City Mayor Michael Bloomberg, and a variety of consumer ad-

vocacy groups also spoke to the Senators about their support for FMAP relief.

Other Provisions The Senate's version of H.R. 4213 also would create a new 340B-1 drug discount program for uninsured inpatients in high Medicare disproportionate share hospitals and would extend the Section 508 wage index reclassification program.

Next Steps The health provisions are only a portion of H.R. 4213, and debate remains around both the cost and substance of the package. The Senate will continue to debate the bill this week. If they pass it, it will need to be reconciled with the House-passed version, and then the reconciled bill will have to pass both houses again before being sent to the President for his signature. ■