

NEW YORK STATE 2020-2021 ENACTED BUDGET

The State Assembly completed passage of final state budget bills for State Fiscal Year 2021 just before 4:00 a.m. on April 3 and the Senate completed its work the afternoon of April 2. The bills were signed by Governor Cuomo on April 3, 2020 and put in place “a nearly on-time” budget deal which came together in the midst of an “all hands on deck” state response to the COVID-19 pandemic and a growing budget deficit due to the collateral impact of the pandemic on New York State’s economy. With a compressed period of time to debate and agree on the FY2021 State Budget, the Legislature employed remote debating and voting procedures to limit physical proximity. There was little time to discuss the projected \$10 to \$16 billion revenue shortfall due to the Coronavirus or the other issues that both the Legislature and the Governor wanted to include in the final budget, and as a result, was the most closed budget process that anyone can remember.

Even prior to the Coronavirus’ effect on State tax receipts, there was a reported a \$6 billion deficit entering into this fiscal year, \$2.5 billion attributed by the Governor to Medicaid overspending. The final \$177 billion budget, attempts to put in place a balanced spending plan through a series of borrowing and cost shifting maneuvers along with federal assistance payments via the CARES Act, enhanced Medicaid (FMAP) reimbursement, as well as enacting Medicaid reforms pursuant to the Medicaid Redesign Team 2 (MRT II) recommendations (in some cases with a delayed effective date to draw down the FMAP funds) and granting the Governor the authority to make adjustments up or down, depending on changes in revenue. Adjustments can be made in early May, early July, and after December 31, 2020 with limited legislative oversight. This is an unprecedented abdication of authority by the State Legislature.

We have included many provisions in the final budget to illustrate that the budget documents include both the budget and some session priorities. Needless to say, we did not get the 3for5 increase, but the final budget is an impressive document given our current state of affairs.

Here are the sections of the final 2020-2021 budget relevant to our programs and services:

OPWDD

- **#bFair2DirectCare Increases and Minimum Wage Funding:** The budget contains \$127 million (state and federal) in funding to cover the continuation of the 1/1/20 2% increase for 100 & 200 CFR Code positions and another 2% for the 4/1/20 increase for 100, 200 & 300 CFR Codes. \$44 million (state and federal) is included to continue the minimum wage increase.
- **Development:** The budget includes “additional State resources that can leverage up to \$120 million” all shares fully annualized (state and federal) in additional funding available for “Program Priorities.”
- **Housing:** \$15 million in capital funds to develop affordable, independent living housing.
- **Extends ABA Exemption:** Extends from July 1, 2020 to July 1, 2025, the exemption allowing OPWDD, OMH and OCFS to employ qualified professionals for services, which may otherwise fall within the scope of practice for Applied Behavior Analysis.

- **“Improve Accountability and Oversight”**: Provides OPWDD with the authority to issue operating certificates to providers of certain programs and Medicaid State Plan services. “The purpose of this legislation is to create more direct authority for oversight and ensure quality of services by providers...and to eliminate duplication of efforts between multiple State agencies.”
 - **Health Homes for DD population** – Transfers oversight of Medicaid funding for community-based services, including those provided by Health Homes to OPWDD. Such providers will be subject to OPWDD oversight and will no longer be subject to the separate NYSDOH Criminal History Record Check.
 - **Autism Awareness and Research Fund** – Includes the Executive Budget proposal to transfer responsibility for this fund from NYSDOH to OPWDD.
 - **CCO’s** – OPWDD will provide \$178 million and will assume oversight of CCO’s from DOH.
- **Individualized Residential Alternatives (IRAs)**: Extends the notification requirements upon the closure or transfer of state operated IRAs until March 31, 2022.
- **Children and Youth with Special Health Care Needs (CYSHCN) Program**: Makes amends to the program within a county with a population of less than 150,000, allowing the county health director to serve as director of the program.
- **Telehealth**: Expands telehealth services by adding OPWDD services as allowable providers. Pursuant to federal participation, NYSDOH is authorized to include additional modalities including audio-only and on-line portals, to expand access to care for behavioral health, oral health and other populations.
- **“Promote More Efficient Use of State Resources”**: “OPWDD will leverage federal Medicaid funding, utilize other supplemental aid where available and take other actions to more cost-effectively support the provision of person-centered programs.” Recoupments of surpluses in supplemental room and board and other state fund payments should yield \$10 million, reduced State Operations overtime payments should produce \$7 million.

Note: While the OPWDD 2% across the board cut effective 7/1/20 was not included in any budget proposals or documents, it is included in the state financial plan. Talks are ongoing in an effort to prevent it.

SED

- **School Aid**: State support for schools will remain nearly flat for a total of \$27.9 billion in school aid. This is a reduction of over \$800 million from the Governor’s initial budget proposal. School districts will receive the same Foundation Aid amount as in 2019-20.
- **4410 & 853 Schools**: There was no additional funding for 4410 or 853 schools but there also weren’t any cuts. We anticipate zero growth for our 853 and 4410 programs.
- **School Mental Health Funding**: Includes \$10 million in funding for grants to school districts to improve student access to mental health resources and services. The program will be administered by OMH, in consultation with SED.

DOH

- **Early Intervention**: There was no mention of either the Governor’s January proposals or any provision for a covered lives pool in the final budget.
- **Health Care Facility Transformation Program**: Includes \$525 million as a *re-appropriation* for this program.

- **Healthcare and Professional Liability for COVID-19:** The final budget limits the liability for health care professionals, health care facilities and organizations that provide treatment and services related to the COVID-19 state of emergency. This includes immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services. Retains provisions regarding liability for harm caused by willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm. “Health Care Facility” includes a hospital, nursing home or other facility licensed or authorized to provide health care services for any individual under Article 28, Article 16, Article 31 of the mental hygiene law or under a COVID-19 emergency rule. “Health care professionals” include agents, volunteers, contractors, employees or otherwise, who are a licensed or certified physician, physician assistant, specialist assistant, chiropractor, pharmacist, pharmacy technician, nurse, midwife, psychologist, social worker, mental health practitioner, respiratory therapist, clinical lab technician, nursing attendant, certified nurse aide, nursing student, EMT, home care worker, health care facility administrator, supervisor, executive, board member, trustee or other person responsible for directing or managing a facility, or anyone else providing health care within the scope of authority permitted by a COVID-19 emergency rule.
- **Public Health Emergency Charitable Trust Fund:** Creates this fund in the joint custody of the Commissioner of Taxation and Finance and the State Comptroller to consist of monetary grants, gifts or bequests received by the state. Such monies will be used for goods and services necessary to respond to a public health disaster emergency or aid in responding to such a disaster. Monies shall be kept separate from and shall not be commingled with any other monies in the custody of the Department of Tax & Finance or the Comptroller.

MRT II

The final enacted budget includes most, but not all, of the MRT II recommendations.

The following MRT II recommendations of interest ARE NOT INCLUDED in the enacted budget:

- **Medicaid OTC/Co-Pay Changes:** Rejects Executive Budget proposals to limit OTC coverage and increase Medicaid copayments.
- **Elimination of Prescriber Prevails:** Rejects the MRT II proposal and retains “prescriber prevails” for Fee-for-Service (FFS) and existing classes under Medicaid Managed Care.
- **Elimination of Spousal/Parental Refusal:** Rejects the MRT II and Executive recommendation to eliminate the ability of spouses living together in the community and parents living with their child, to refuse to make their income and resources available during the determination of an applicant’s eligibility for Medicaid.

The following MRT II recommendations of interest ARE INCLUDED in the enacted budget:

- **Removal of Medicaid Visit Caps – OT, PT, Speech Therapy:** Effective October 1, 2020, Medicaid visit caps for speech therapy, physical therapy, including related rehabilitative services, and occupational therapy are repealed for all Medicaid recipients and not just those with I/DD and TBI.
- **Shift Pharmacy Benefit to Fee-for-Service (FFS):** Includes language stating that it is in the best interest of the Medicaid program/patients to move the pharmacy benefit from Medicaid Managed Care back to Fee-for-Service. NYSDOH is authorized to establish uniform standards, payment policies and reimbursement methodologies based on actual acquisition costs and professional dispensing fees. This shift includes elimination of the savings that the **340B program in Medicaid managed care** provides for Federally Qualified Health Centers (FQHCs)

and other safety net providers. The 340B program, authorized under section 340B of the Federal Public Health Service Act, creates a drug discount program that allows safety-net health care providers to buy pharmaceutical drugs at a reduced price. Health centers use the significant 340B savings to expand services for the uninsured and underinsured and help cover essential services that are not billable to Medicaid. For example, health centers use 340B savings to: finance their sliding fee scales; subsidize low cost or free medications for low-income patients; subsidize high deductibles for the underinsured; upgrade information technology infrastructure; train staff, etc. Many health centers have pharmacies located on site, offering unprecedented access and one stop shopping for their patients. Without the 340B discount, in-house pharmacies would be at risk of closing. Fortunately, the final budget language requires NYSDOH to examine all methods of determining actual acquisition costs beginning in the 4/1/21 fiscal year and shall adjust the reimbursement for the 340 B drugs no sooner than 4/1/23.

- **Establishes an Independent Assessor for Personal Care and CDPAP:** Includes a recommendation by the MRT II to require NYSDOH to establish or procure an independent assessor to take over from LDSSs, MCOs, and MLTCs the UAS Community Health Assessments and reassessments required for determining needs for personal care services. The use of the independent assessor must be implemented by October 1, 2022.
- **Eliminates Notice of the Consumer Directed Program:** Adopts a recommendation by the MRT II to eliminate requirement that managed care plans and LDSS educate consumers about the availability of the CDPAP program annually. The final budget expands this provision to limit the ability of individuals to apply for participation in CDPAP only once annually.
- **Independent Review for CDPAP and Personal Care Cases:** Includes a recommendation by the MRT II to establish an independent panel of clinicians to determine eligibility for CDPAP cases.
- **Global Spending Cap/Adjustment Authority:** Extends the global cap through SFY 2022. Requires the NYSDOH Commissioner to assess monthly, known and projected Department of Health state-funded Medicaid expenditures and calls for implementation of a Medicaid savings allocation adjustment if program spending exceeds the projected Department of Health disbursements. The adjustment would be applied equally across the board unless the Health Commissioner and State Budget Director determine “a specific category or categories of service are responsible for the growth,” in which case the adjustment will be applied to just those areas.
- **Across-the-Board (ATB) Medicaid Cuts:** The state will increase the across-the-board Medicaid provider cut from 1%, enacted 1/1/20, to 1.5% effective 4/1/20, for an annual savings of \$373 million. Exempt from reductions are payments pursuant to Article 32, 31 and Article 16 of the mental hygiene law, payments for Federally Qualified Health Centers, Early Intervention, Family Planning services, Hospice services, School Supportive Health Services Program, Preschool Supportive Health Services Program, payments provided by other state agencies including OCFS, SED and DOCCS, among others. Like the original 1% cut, OPWDD services are not affected.
- **Health Homes:** Includes \$279.35 million, a decrease of \$48.7 million from last year’s level.
- **Patient-Centered Medical Homes (PCMH):** Includes reforms to PCMH to achieve \$6 million in savings this fiscal year.
- **Telehealth:** Expands telehealth services by adding care managers in Health Homes, PCMHs, hospice, OPWDD services and foster care as allowable providers. Pursuant to federal participation, NYSDOH is authorized to include additional modalities including audio-only and on-line portals to expand access to care for behavioral health, oral health, maternity care and other populations.

- **Private Duty Nursing:** Authorizes NYSDOH to increase fees for private duty nursing under Medicaid for medically fragile children. NYSDOH will also develop a directory of qualified fee for service private duty nursing providers. Includes \$12.8 million for this program.
- **VBP Demonstration Program:** Authorizes NYSDOH, in consultation with DFS to implement one or more 5-year demonstration programs designed to implement health outcomes and reduce costs, using value based payments based on an actuarially sound pre-paid, capitated rate. The program may offer funding designed to improve health outcomes, develop infrastructure and systems and connect individuals with community-based organizations focused on social determinants of health.
- **Regional Population Health Improvement:** Authorizes NYSDOH, in consultation with DFS, to implement one or more 5-year demonstration programs, beginning January 2022, to accelerate regional population health initiatives using value based payment models and aligning care incentives under an integrated health system.
- **Pilot Programs Promoting Social Determinants of Health Interventions:** Establishes the following pilot programs which will take effect September 1, 2020 or within 90 days of the conclusion of the State of Emergency relating to COVID-19.
 - Medically Tailored Meals for individuals with cancer, diabetes, heart failure, and/or HIV/AIDS and who have had one or more hospitalizations within a year.
 - Respite programs to provide care to homeless patients who are too sick to be on the streets or a traditional shelter, but not sick enough to warrant hospitalization.
 - Street medicine program to allow diagnostic and treatment centers licensed under Article 28 of the public health law to bill for certain services provided at offsite locations in order to serve the chronically homeless population.

OMH

- **#BFair2DirectCare:** The Budget includes the 2% increase effective 1/1/2020 for 100 & 200 Codes and 2% increase effective 4/1/2020 for 100, 200 & 300 Codes but delays the COLA.
- **Housing:** \$20 million for increased funding for community housing rates which doubles prior year funding.
- **School Mental Health Funding:** Includes \$10 million in funding for grants to school districts to improve student access to mental health resources and services. The program will be administered by OMH, in consultation with SED.
- **Behavioral Health Parity:** Establishes the Behavioral Health Parity Compliance Fund for the collection of penalties imposed on insurance
- **Veterans:** Adds \$2,017,500 for the Joseph P. Dwyer Veteran Peer to Peer Services program.
- **Children's Behavioral Health Services:** Includes investment of \$1.7 million for such services under Medicaid.
- **Children's Residential Treatment:** Modifies the Executive proposal to streamline pre-admission for children and youth with mental illness entering residential treatment facilities by:
 - Expanding the newly created Advisory Board to include family representatives and medical personnel,
 - Requiring the Advisory Board to issue an annual report to the Governor and Legislature;
 - Limiting medical necessity checks to be done no sooner than 14 days after admission; and
 - Requiring OMH to consult with the residential treatment facility regarding placement before doing so.

- **Services for Sex Offenders:** Establishes a separate appointing authority within OMH (Secure Treatment and Rehabilitation Center) for the care and treatment of sex offenders requiring confinement.
- **Comprehensive Psychiatric Emergency Programs (CPEPs):** Extends the CPEPs program for four years and:
 - Requires that triage and referral services be provided by a psychiatric nurse practitioner or physician as soon as a person is received into the comprehensive psychiatric emergency program;
 - Requires that if a patient is not discharged within six hours, they must be examined by a physician; and
 - Permits hospitals that operate CPEPs, upon approval of the Commissioner of OMH, to operate satellite facilities. A satellite facility is defined as a medical facility providing psychiatric emergency services that is managed and operated by a hospital who holds a valid operating certificate for a CPEP and is located away from the central campus of the general hospital.
- **Extends ABA Exemption:** Extends from July 1, 2020 to July 1, 2025, the exemption allowing OPWDD, OMH and OCFS to employ qualified professionals for services, which may otherwise fall within the scope of practice for Applied Behavior Analysis.
- **MLTC Coverage of Behavioral Health:** Authorizes Managed Long-Term Care (MLTC) plans to cover behavioral health services for enrollees.

MISCELLANEOUS ALL STATE DEPARTMENTS AND AGENCIES

The final budget includes two catchall Emergency Appropriations. A **\$25 billion Special Federal Emergency Appropriation** is established to account for revenues received from the federal government in order to meet unanticipated or emergency expenditures, including public health emergencies. Funds appropriated are subject to all applicable reporting and accountability requirements contained in the act or acts making such federal revenue available. In addition, the final budget includes a **\$4 billion Special Public Health Emergency Appropriation**. This appropriation is for services and expenses related to the outbreak of coronavirus disease 2019 (COVID-19). A portion of these funds may be made available as state aid to municipalities, school districts, public authorities, and *eligible nonprofit organizations* for services and expenses related to the outbreak of coronavirus disease 2019 (COVID-19).

PAID SICK LEAVE

In addition to the recently passed sick leave legislation, which is in effect during the declared emergency for the COVID-19 pandemic, the Budget included permanent paid sick leave requirements that are effective 1/1/2021. The new, post COVID-19 paid sick leave law requires employers to provide the following effective 1/1/2021:

- For an **employer with four or fewer employees**, and a net income of less than \$1 million: 40 hours **unpaid** sick leave
- For an **employer with four or fewer employees with a net income of \$1 million or more**: 40 hours paid sick leave
- **For an employer with 5-99 employees**: 40 hours of paid sick leave
- For an **employer with 100 or more employees**: 56 hours of paid sick leave

Sick leave is to be paid at the employee's rate of pay or current minimum wage, whichever is greater.

Accrual:

- Employees accrue sick leave at a rate of at least one hour for every 30 hours worked
- Unused sick leave shall be carried over to following calendar year, but employers with fewer than 100 employees may limit use to 40 hours per year, and employers with 100 or more employees may limit use to 56 hours per year

Reasons for Use of Sick Leave:

Employees may make oral or written leave requests for:

- Mental or physical illness, injury or condition diagnosed or requiring medical care during the time of said leave.
- When the employee or their family is victim to domestic violence, a sexual offense, stalking or human trafficking, and to complete the following tasks related to such incidents:
 - To obtain services from a domestic violence shelter, rape crisis center or other services program
 - To participate in safety planning, relocation, or other actions to increase safety for the employee or their family member
 - To meet with an attorney or social services provider regarding any criminal or civil proceeding
 - To file a complaint or domestic incident with law enforcement
 - To meet with the District Attorney
 - Enroll children in a new school
 - Other necessary actions

Definition of a Family Member:

- Employees child, spouse, domestic partner, parent, sibling, grandchild or grandparent
- A child or parent of the employee's spouse or domestic partner
- "Parent" meaning biological, foster, step, adoptive or legal guardian, or anyone who stood in loco parentis (having parental rights) when the child was a minor

PAID TIME OFF TO VOTE

Last year's budget included new voting provisions including early voting and the requirement that all registered voters be given three hours paid time off, either at the beginning or end of their shift, to vote. The employee had to request this time off not more than ten and not less than two days prior to election day.

This year's budget has amended the provision so that if an employee has four consecutive hours either between when the polls open and the beginning of their shift or between the end of their shift and the closing of the polls, they "shall be deemed to have sufficient time outside his or her working hours within which to vote." If the employee has less than four consecutive hours, they may take up to two hours paid time off at the beginning or end of the shift to vote.

Additionally, the employee has to request this time off not more than ten and not less than two days prior to election day. Employers must conspicuously post this information ten days prior to election day and keep it posted until the polls are closed on election day.

PREVAILING WAGE

The final budget includes the Governor's proposal to expand prevailing wage to certain private projects paid in whole or in part out of public funds (\$5 million or 30% threshold) – with exemptions including the following:

- Affordable housing construction: where at least 25% of the residential units are affordable and shall be retained subject to an anticipated regulatory agreement with a governmental or not-for-profit entity, provided that the period of affordability is at least 15 years from the date of construction.
- Funds provided for NYC charter school construction.
- New York City School Construction Authority projects on spaces used as a school under 60,000 square feet (the original carve-out was for spaces under 20,000 square feet).

This new prevailing wage law is effective on January 1, 2022, with a Board to be established effective April 1, 2021. However, "if the Board finds a significant negative economic impact of implementing prevailing wage requirements, the Board may temporarily delay implementation statewide or by region beyond January 1, 2022."

OTHER FEATURES OF THE ENACTED BUDGET INCLUDE:

- **Prescription Drugs:** Caps insulin co-payments at \$100 per month for insured patients and establishes a commission to study the feasibility and benefits of a Canadian drug importation program
- **Banning the "Pink Tax":** Prohibits gender-based pricing discrimination for substantially similar or like kind goods and services.
- **\$3 Billion to Restore Mother Nature Bond Act:** Funding for projects focused on reducing flood risk, investing in resilient infrastructure, restoring freshwater and tidal wetlands, preserving open space, conserving forest areas, and reducing pollution from agricultural and storm water runoff. It will also fund up to \$700 million in projects to fight climate change, including green buildings. It also aims to spend 35 percent of the funds on projects to benefit underserved areas of the state. The Budget Director will assess the state's finances and the economic outlook later this year and make a determination as to whether to move forward with the Bond Act.
- **Permanently Bans Hydrofracking:** Cuomo administratively banned high-volume hydraulic fracturing in 2014 which could have been overturned by another Administration. The budget contains a statutory ban on high-volume hydraulic fracturing which would require repeal by the Legislature and the Governor.
- **Accelerating Renewable Energy Projects and Driving Economic Growth as Part of Nation-Leading Climate Agenda:** The Act will create a new Office of Renewable Energy Permitting to improve and streamline the process for environmentally responsible and cost-effective siting of large-scale renewable energy projects including the mandate to obtain 70 percent of the state's electricity from renewable sources as identified under the state's Climate Leadership and Community Protection Act.
- **Banning the Distribution and Use of Styrofoam:** Prohibits the distribution and use of Styrofoam, single-use food containers and packing peanuts, will go into effect by January 1, 2022
- **Campaign Finance Reforms:** Effective after the 2022 elections, candidates will have to meet certain fundraising thresholds to qualify. The maximum contribution limits for candidates will also drop to \$18,000 for statewide candidates, down from about \$70,000 now. Third parties, such as Working Families, Conservative, Independence parties, will have to tally at least

130,000 votes — or 2 percent of the total, whichever is larger — on their line in presidential and gubernatorial elections to maintain their automatic spot on the ballot. Previously, the threshold was 50,000 votes in gubernatorial elections.

- **Legalizing Gestational Surrogacy in New York State:** For LGBTQ couples and couples struggling with infertility.
- **"New York Hate Crime Anti-Terrorism Act":** Classifying "domestic act of terrorism motivated by hate" crime as a new A-1 class felony punishable by up to life in prison without parole.
- **Comprehensive Tobacco Control Policy:** Prohibits the sale or distribution of e-cigarettes or vapor products that have a characterizing flavor unless approved as part of an FDA pre-market approval and may other protections regarding availability of tobacco and e-cigarette products.
- **High Speed Rail:** Convenes a team to recommend a new plan for how to build faster, greener, more reliable high-speed rail in New York.
- **Investing in Roads and Bridges:** The FY2021 Enacted Budget supports \$6 billion for the Department of Transportation capital plan in FY2021, including \$2.6 billion for Upstate roads and bridges.
- **Banning Fentanyl Analogs:** Designates certain fentanyl analogs as controlled substances in New York State.
- **Adjustments to 2019 Criminal Justice Reform Law:** Clarifies the 2019 law to make sure judges know all the options available to them with respect to non-monetary conditions for release; enhances the options upon which a judge can condition release, including mental health referrals and requirements to attend counseling; and it adds several offenses that can be bail eligible, including sex trafficking offenses, money laundering in support of terrorism in the 3rd and 4th degree, child pornography offenses, repeat offenders, and those who commit crimes resulting in death.
- **Counting Every New Yorker in the 2020 Census:** Provides additional funding to ensure a fair and complete count of every New Yorker in the upcoming 2020 census.
- **Strengthening Disclosure Laws:** Amends New York Executive Law § 172, requiring disclosures of political relationships and behaviors widely recognized to be influential by streamlining the reporting process for 501(c)(3) and 501(c)(4) organizations.
- **Medical Transparency Website:** Sets up a new website created by NYSDOH & DFS called "NY Healthcare Compare," where New Yorkers can easily compare the cost and quality of health care procedures at hospitals around the state.
- **Making the "New York Buy American" Act Permanent:** Set to expire in April 2020, requires State agencies to use high-quality American-made structural iron and steel, continuing to support the State's steel and iron industry.

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