New York Legal Assistance Group

Public Comment to the NYS Department of Health

Medicaid Buy-In Program for Working People with Disabilities (MBI-WPD) Demonstration Program

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NYLAG Strongly Supports Expansion of the MBI-WPD Program and Recommends Some Modifications to Ensure Access

Founded in 1990, New York Legal Assistance Group (NYLAG) is a leading civil legal services organization combatting economic, racial, and social injustice by advocating for people experiencing poverty or in crisis. Our services include comprehensive, free civil legal services, financial empowerment, impact litigation, policy advocacy, and community partnerships. NYLAG exists because wealth should not determine who achieves justice. We aim to disrupt systemic racism by serving individuals and families whose legal and financial crises are often rooted in racial inequality. NYLAG goes to where the need is, providing services in more than 150 community sites (e.g. courts, hospitals, libraries) and on our Mobile Legal Help Center. NYLAG's staff of 350 impacted the lives of 129,000 people last year. More information is available on our website: www.nylag.org

NYLAG strongly supports the expansion of the Medicaid Buy-In for Working People with Disabilities (MBI-WPD) to: include people age 65 and over, and expand the income and asset limits for this important program. We applaud New York State (NYS) for implementing the MBI-WPD program from the very inception of the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA). Below, we review the provisions we support in this expansion, raise some concerns and offer recommendations for how this expansion is implemented, and ask for some clarifications on language.

We have chosen not to comment in detail on the Career Pathways Training (CPT) Program Amendment but are generally in support of the amendment.

I. NYLAG strongly supports expansion of the MBI-WPD Program, as it will enable more people with disabilities to continue working, maintain critical health care coverage, and save money needed for their eventual retirement.

The draft waiver amendment cites important research findings documenting the high unemployment rate for people with disabilities, which was exacerbated by COVID-19. This population, at large, has not benefited from the post-pandemic economic recovery enjoyed by the able-bodied population. Thus, providing broad support to people with disabilities who choose to and are able to work is crucial to advance equity and disability justice.

When a person with a disability does find work, the availability of Medicaid is critical. As stated in the proposed waiver amendment, neither Medicare nor employer-based group health insurance covers Long Term Services and Supports (LTSS). Only Medicaid provides these critical services – most commonly state plan Personal Care services or its self-directed option – that enable an individual with a disability to work. Given the critical

role Medicaid plays in the lives of people with disabilities, we support the following aspects of the draft waiver amendment.

First, we support the elimination of the upper age limit of 65 years of age. The proposed amendment would allow NYS to close a critical gap in federal law, which terminates the Ticket to Work program at age 65.

Working individuals with disabilities often have a financial need to continue to work past the age of 65. Yet under the current Medicaid Buy-In Program eligibility rules, those individuals who are working past the age of 65 are no longer eligible for the program. As a result, NYLAG has had to counsel many working clients who reach age 65 that their Medicaid will transition from the more expansive income eligibility rules of the Medicaid Buy-In Program (250% FPL), to the stricter eligibility rules of the regular Medicaid program (138% FPL) – burdening them with a high spend-down they cannot afford. Also, our clients who reach 65 must start withdrawing distributions from their retirement benefits, instead of letting their retirement benefits grow as allowed under NYS's MBI-WPD. With the important changes in this draft waiver amendment, our clients in the MBI-WPD program will be able to remain in the program, with all its benefits such as the retirement fund disregard, when they turn 65.

Second, we support the continued disregard of all funds held in retirement funds or retirement accounts, and the continued use of other more liberal methods of treating resources under New York's State Plan. As stated previously, the current MBI-WPD program rules enable program participants to maintain their retirement benefits untouched, allowing retirement benefits to grow over time. This disregard of funds held for retirement is crucial for our clients, who are low income and do not often have much held in retirement funds or retirement accounts. Enabling MBI-WPD program participants to work past 65, without withdrawing from their retirement, ensures they will be able to support themselves with their retirement funds for a few more years than they would otherwise.

Third, we support the increased income and resource rules. Establishing an MBI-WPD program income limit of 2,250% of the FPL, and a resource standard of $300,000, will greatly expand the number of working individuals with disabilities who are eligible for Medicaid benefits through this program.

While we support increasing the asset limit should an asset limit exist, we urge that in the future, NYS follow other states that have *eliminated* the asset test for their TWWIAA programs (e.g., MA, CO, TX) and for Medicaid entirely (as California has done). Asset rules in public benefits programs demonstrate inherent racial biases. Furthermore, asset rules in public benefits perpetuate racial inequities, since they exempt the value of homes and retirement funds, which many Black, Indigenous and People of Color (BIPOC)

consumers are unable to purchase.[1] While increasing the asset limit to $300,000 is a good start, that amount still pales in comparison to the $1 million dollar home that a Medicaid recipient may keep and still receive Medicaid LTSS.

Fourth, we support waiving a spouse's income and resources by deeming the income and resources of a legally responsible relative as unavailable. This will effectively end the "marriage penalty" that people with disabilities are currently subject to, which forces them to decide between retaining assets or legally marrying the person they love.

II. NYLAG makes the following recommendations for changes to this important expansion.

First, we recommend there be no cap on enrollment – or in the alternative, that the cap on enrollment does not include individuals eligible under existing criteria.

While not clear from the state law, the proposed waiver amendment states that the program enrollment cap of 30,000 members will include those who qualify for MBI-WPD under the existing criteria set forth in SSL 366, subd. 1(c)(5) and (6) and SSL 367-a, subd. 12. We acknowledge that the cap should not be a barrier for a number of years, given that: the stated number of current enrollees is 12,500; the State estimates that the program will increase by 2,195 people annually; and there will be attrition as some people of advanced age no longer have the ability to work. However, we hope and expect for NYS to eventually reach 30,000 program participants. When the cap is reached, subsequent eligible applicants in need of the program will be unable to enroll, regardless of their income. In effect, this means that some higher-income program enrollees may prevent lower-income applicants from enrolling.

To prevent that inequity, we recommend that NYS eliminate the enrollment cap.

In the alternative, we recommend that the cap not be applied to people who qualify with incomes under 250% FPL and assets under the current regular asset limits. This could be accomplished in a number of ways, including:

- Once the cap is reached, evaluate subsequent applicants for eligibility under the existing State plan criteria (250% FPL, regular asset limit, and excluded retirement

[1] NYS Attorney General, *Racial Disparities in Home Ownership*, 10/31/23 available at https://ag.ny.gov/sites/default/files/reports/oag-report-racial-disparities-in-homeownership.pdf (Finding white households in NYS are more than twice as likely to own their home as compared to Black or Latino households, in part due to racially disparate lending practices.); NYS Comptroller, *Home Ownership Rates in New York*, Oct. 2022, available at https://www.osc.ny.gov/reports/homeownership-rates-new-york (Finding New York's annual homeownership rate in 2021 to be the lowest in the nation at 55.4 percent – with California ranking as the second lowest; also finding homeownership rates in 2021 were 67 percent for White households, 52 percent for Asian households, 34 percent for Black households, and 29 percent for Hispanic households in New York).

benefits). If they qualify under those criteria, they would be enrolled in the MBI-WPD state plan. This option would be the least burdensome administratively, since the State predicts that the cap will not be reached.

- Alternately, since the proposal, at page 5, states that the "State will maintain its State Plan authority for its current MBI-WPD State Plan Amendment (SPA) groups," individuals who qualify under the State plan would be classified as State plan enrollees, and not be counted toward the enrollment cap of 30,000.

Second, we recommend the monthly premium schedule be modified so it is capped at no higher than 7.5% for all income levels at or under 450% FPL.

NYLAG recommends that the premium schedule be modified to include a 7.5% cap for all incomes, including those between 400 - 450% FPL. As the proposal states on page 7, "[t]he Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA) provides that the premium the individual must pay when income is 450% FPL or less must not exceed 7.5% of the individual's income. SSA §1916 (g)(1)(B)." Despite the authority provided in TWWIA, this draft waiver amendment would impose a premium of 8.5% for people with incomes from 400 - 450% FPL.[2] Thus, we urge that the premium schedule be modified to be consistent with the TWWIIA 7.5% cap for *all* incomes at or below 450% FPL, including those between 400 - 450% FPL.

Third, we recommend that additional premium relief be applied to middle income families, so as to avoid a regressive premium structure.

As the draft waiver amendment is currently written, the monthly premium is set at the lesser of a specific dollar amount or a specific percentage of net monthly income. In effect (comparing the two and looking for the lesser value), this means that individuals earning between 250 - 299% FPL would pay a premium worth 4% of their income, those earning between 300 - 399% FPL would pay a premium worth 6% of their income, those earning between 400 - 1499% FPL would pay a premium worth 8.5% of their income,[3] yet those earning 1500% FPL and above would pay the specific dollar amount of a $1,033 premium – which is worth *less* than 6% of their income. While we commend the lower relative premiums for higher earners, we do not approve of the regressive effect this imposes on middle-income families earning between 250 - 399% FPL.

[2] NYLAG commends the state for ensuring that at all other income ranges below 450% FPL, the state's proposal is compliant with the 7.5% cap provided for in the TWWIIA.
[3] Please note our second point, above, regarding our recommendation that New York lower the premium cap for individuals making 400 – 450% FPL to 7.5% of their income.

NYLAG made the following table showing the regressive nature of the current premium caps.[4]

Examples of Maximum Premium, Using Statutory Cap on Percentage of Income

Consumer has net available income of:	Net monthly income (2023) - single	Max premium/month **before** applying cap of % income	Statutory premium cap % monthly income	**Actual premium applying statutory cap**	Premium is what **actual % of net income**
250%	$3,038	$347	4%	$ 122	4%
275%	$3,341	$347	4%	$ 134	4%
300%	$3,645	$518	6%	$ 219	6%
350%	$4,253	$518	6%	$ 255	6%
400%	$4,860	$779	8.5%	$ 413	8.5%
500%	$6,075	$1,033	8.5%	$ 516	8.5%
1000%	$12,150	$1,033	8.5%	$ 1,033	8.5%
1500%	$18,225	$1,033	8.5%	$ 1,033	5.7%
2000%	$24,300	$1,033	8.5%	$ 1,033	4.3%
2250%	$27,340	$1,033	8.5%	$ 1,033	3.8%

Highlighted cells –At higher income levels, premium is a smaller percentage of actual net income because max premium is capped at $1,033/mo.

Thus, we recommend that NYS modify the premiums required for families earning between 250 - 399% FPL, such that middle income families owe no greater a percentage of their incomes in premiums than what the highest earning families in the program owe. One option is to reduce the percentage of net monthly income these families would pay to 3.8%, which is what the highest earning families would pay. A second option is to reduce the specific dollar amount these families would pay in premiums, such that it equates to 3.8% of their net monthly income at each income level between 250 - 399% FPL.

III. NYLAG asks for the following clarifications, either in the waiver amendment or in implementing guidance.

First, NYLAG recommends that implementation materials clarify that the monthly premium cap uses net available income, not gross monthly income.

Neither the State statute that authorizes this waiver expansion, nor the proposed waiver amendment, clarify whether the cap on the premium is based on the percentage of net income or gross income. We appreciate that NYS requests "SSI-related budgeting is used to determine net monthly income." See p. 8 of the waiver amendment, asterisk under the first table. However, the waiver amendment does not state whether the premium cap uses net available income. Since every other reference in the amended statute is to "net

[4] http://health.wnylc.com/health/afile/59/837/

available income," the premium should be capped at the specified percentage of net available income.

Second, we ask that language on the monthly premium be clarified for individuals with incomes 150 - 250% FPL.

The amended state law and proposed waiver amendment say no premium will be charged if income is under 250% FPL. We ask for clarification that the existing state statutory provision for a $25 premium for individuals ($50 for couples) with income 150 - 250% FPL will be repealed and/or not take effect. SSL 367-a, subd. 12.

Third, we ask that language around the income limit be clarified to state it is based on the full family, including non-eligible spouses and children.

To promote the ability of working people with disabilities to support their dependent children, the income limit should be based on the Federal Poverty Level for the "family of the size involved," as used for the Part D Low Income Subsidy. 42 U.S.C. 1395w-114(a)(1); 42 C.F.R. 432.772. Various courts have held that this definition must be used by the Medicare Savings Program.[5] All of these cases required non-eligible spouses to be counted in the household size. The same reasoning as to other family members, especially dependent minor children, is applicable.

> **Example:** NYLAG has a client who is quadriplegic and works in technology. He is married and has twins, now age 8. The proposed expanded income limit will be beneficial for him and his family. To maximize that benefit, however, it is important to use the Federal Poverty Level for a family size of four, rather than only one or two as is currently used. (Whether the size is currently one or two depends on the spouse's income amount). A working parent with a disability has expenses from raising children – from the cost of day care, summer camp, activities, and clothing to saving for future college education.

By enabling a parent to qualify at the income level for the true family size, they can better support their entire family. This definition can be implemented administratively without any change in the law.

Fourth, we recommend language about the Medical Improvement Group be clarified so as not to assume that everyone over 65 falls into the Medical Improvement Group.

[5] See, e.g., Wheaton v. McCarthy, 800 F.3d 282 (6th Cir. 2015); Winick v. Department of Children and Family Services, 161 So.3d 464 (Dist. Court of Appeal 2014); Martin v. N.C. DSS, 670 S.E.2d 629 (N.C. Court of Appeals 2009); Skaliotis v. R.I. Dep't of Hum. Servs., No. C.A. NO. 95-2438, 1996 WL 936920 (R.I. Super. Apr. 18, 1996).

The amended state law continues to have a Ticket to Work Basic Group ("Basic Group") and a Ticket to Work Medical Improvement Group ("Medical Improvement Group"), as allowed by TWWIAA and as in the current MBI-WPD program. But clarification is needed, given the following statutory language:

> (c) An individual at least sixteen years of age who: is employed;
> 2 ceases to be eligible for participation in such waiver pursuant to para-
> 3 graph (b) of this subdivision because the person, by reason of medical
> 4 improvement, is determined at the time of a regularly scheduled continu-
> 5 ing disability review to no longer be certified as disabled under the
> 6 social security act; continues to have a severe medically determinable
> 7 impairment, to be determined in accordance with applicable federal regu-
> 8 lations; and contributes to the cost of medical assistance provided
> 9 pursuant to this paragraph in accordance with paragraph (d) of this
> 10 subdivision, shall be eligible for participation in such waiver. For
> 11 purposes of this paragraph, a person is considered to be employed if the
> 12 person is earning at least the applicable minimum wage under section six
> 13 of the federal fair labor standards act and working at least forty hours
> 14 per month.

N.Y. Soc. Serv. Law § 366, subd. 16. (c).

The provision above could be read to classify every individual age 65 and over as being in the Medical Improvement Group, rather than the Basic Group, since no one age 65 or over may be certified as disabled under the Social Security Act. Indeed, the federal Medicaid law defines the term "employed individual with a medically improved disability" as one between ages 16 and 65.

We recognize that the State is asking CMS to waive the age limit of 65 in this provision. However, the language of this draft amendment should be further clarified to state that individuals over age 65 are eligible for either group (Medical Improvement Group and Basic Group); it should not be assumed that because someone has reached age 65, and thus they could no longer be certified as disabled under the SSA, that they have had medical improvement.

This ambiguity is concerning because of the more stringent work requirement (of forty hours per month at the minimum wage) that applies to the Medical Improvement Group, but not to the Basic Group. Implementing guidance or the waiver amendment should clarify that individuals may remain in the Basic Group after age 65, even though they are no longer certified as disabled by the SSA or under the SSA. Individuals should be classified in the Medical Improvement Group only if they are determined, because of medical improvement, to no longer be eligible for SSD or SSI based on disability, without taking age into account in that determination.

This clarification is needed for the MBI-WPD to be a work incentive for people age 65 and over who may not be able to work 40 hours a month at minimum wage, but nevertheless who can and want to continue to work.

Thank you for the opportunity to submit this public comment. Please feel free to contact us with any questions.

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