

**New York State Bar Association Health Law Section  
Hot Topics in New York Health Law  
State and Federal Legislative Update  
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I. New York State Legislative Update

A. Political Backdrop

1. *Election year:* 2018 will be a year full of election-year politics and heightened partisanship, with the Governor, Lieutenant Governor, State Comptroller and the Attorney General on the ballot this fall, along with every member of the New York State Legislature and the U.S. House of Representatives, and one of New York's U.S. Senate seats.
2. *2020:* Two statewide office holders expected to be on that ballot—Governor Andrew Cuomo and Senator Kirsten Gillibrand—are also widely mentioned as potential Presidential candidates in 2020, making this election a critical test for each of them.
3. *State Assembly:* The “People’s House” remains overwhelmingly Democratic and will remain unchanged in 2019. The Assembly has had more than 105 Democratic members in the 150 member chamber since 2013 and we expect that more than two-thirds Democratic majority will remain in place beyond 2018.
4. *State Senate.:* As of January 1, 2018, the 63-member State Senate is composed of 31 Republicans, one Democrat (Simcha Felder) who has consistently confederated with the Republicans, 21 members of the mainline Democratic Conference, and 8 members of the separate Independent Democratic Conference (IDC). There are two vacancies, resulting from George Latimer’s election as Westchester County Executive and Ruben Diaz Sr.’s election to the New York City Council.
5. *Prospects for Senate Democratic Control:* The IDC has governed with the Republicans in a de facto coalition since January of 2011. Although an apparent agreement, brokered by the Democratic State Committee and Governor Cuomo, has been reached to reunite the Senate Democrats, the realignment may still be in the formative stage and will only be tested once the legislative session resumes in

earnest. The reunited Democratic coalition would not, in any event, appear to have the votes to unseat the Republican majority before 2019—since Senator Felder would also need to join the Democrats, the Democrats would have to win both seats in the not-yet-scheduled special election and the Senate’s rules require a vote of 38 Senators (or two-thirds of the entire chamber) to replace a Majority Leader in the middle of his or her two-year term.

6. *Implications of Democratic Control of the State Senate:* If the Democrats were to control both houses of the Legislature in 2019, it would be expected that a host of Democratic proposals that have been stalled in the Republican-led Senate would be passed by both houses—including much of what the IDC and the Democratic conference have highlighted in their discussions, such as single-payer health care, public campaign finance, the DREAM Act, strengthening reproductive rights, prohibiting discrimination based on gender identity and a host of other proposals. If that were to occur, these bills would find their way to the Governor’s desk, just as the campaign for the Presidency in 2020 was reaching full steam.

B. The 2017 Legislative Session Overview

1. *Bill Volume:* This past legislative session generated the fewest new laws since Governor Cuomo took office in 2011—thanks, in part, to a relatively healthy veto to approval ratio of 1:5.

<i>Year</i>	2017	2016	2015	2014	2013	2012	2011
<i>Approvals</i>	502	519	589	552	558	505	610
<i>Vetoes</i>	101	100	133	109	87	61	68

2. *Budget Legislation:* As has often been the case in recent years, much of the most significant legislation was enacted as part of the State Budget, including a proposal to raise the age of criminal responsibility from sixteen to eighteen, a new Excelsior Scholarship program to eliminate tuition for eligible students at SUNY and CUNY institutions (together with an enhancement to tuition assistance for participating private colleges), increased funding for direct support professionals providing services to persons with developmental disabilities or with mental illness, authorization for ride-sharing businesses (like Uber and Lyft) in upstate New York, and a series of economic development and infrastructure initiatives to promote jobs, affordable housing and clean water. To help pay for all of the above, the Legislature agreed to extend a tax on millionaires.

C. Highlights of 2017 Health-Related Legislation by Subject:

(1) *Public Health*

- (a) Studies on Asthma (Veto Memo 219 of the Laws of 2017; A.703 Sepulveda / S.3103 Serrano; A.7214 Seawright / S.5559 Alcantara; A.947 Simon / S.5770 Hamilton): These bills would have directed the Department of Health to complete a study on the incidence of asthma in the Bronx, Brooklyn, and Manhattan, with a focus on examining income, racial, ethnic, and environmental disparities. This bill was vetoed by the Governor on December 18, 2017.
- (b) Sexual Offense Kits (Chapter 6 of the Laws of 2017; A.375 Simotas / S.980 Hannon): This law provides technical amendments to Chapter 500 of the Laws of 2016 by clarifying that police and prosecutorial agencies must develop DNA profiles from evidence that is eligible for comparison to the federal CODIS database. This law also requires police and prosecutorial agencies to inventory any sexual offense kits they possessed and to submit such inventories to the New York State Division of Criminal Justice Services. This law was signed by the Governor on February 1, 2017 and is deemed to have been in effect since November 28, 2016.
- (c) Disaster Planning for Homecare and Hospice (Chapter 385 of the Laws of 2017; A.6549-A Cusick / S.5016-A Lanza): This law requires comprehensive emergency management plans to include input from homecare providers. This law was signed by the Governor on October 23, 2017. This law took effect immediately.
- (d) Sepsis Awareness (Chapter 347 of the Laws of 2017; A. 6053-A Nolan /S. 4971-A Marcellino): The law requires the Commissioner of Education, in consultation with the Commissioner of Health and sepsis awareness organizations, to establish a sepsis awareness, prevention and education program. This law was signed by the Governor on October 23, 2017 and will take effect July 1, 2018.
- (e) Newborn Health and Safe Sleep Pilot Program (Chapter 401 of the Laws of 2017; A.6044-A Simotas / S.3867-A Hannon): This law requires the Commissioner of Health to establish a newborn health and safe sleep pilot program. The program would provide ‘baby boxes’ and other products that encourage safe sleep practices and reduce the incidence of sudden infant death

syndrome, as well as information on infant safe sleeping. This law was signed by the Governor on October 23, 2017 and took effect immediately.

- (f) Maternal Depression Treatment (Chapter 463 of the Laws of 2017; A.8308 Richardson / S.4000 Krueger): This law requires the Commissioner of Health, in collaboration with the Commissioner of Mental Health, to compile a list of providers who offer services related to maternal depression. This law was signed by the Governor on December 18, 2017 and took effect on January 1, 2018.
- (g) Designation of Comprehensive Care Centers for Eating Disorders (Chapter 259 of the Laws of 2017; A.7949 Ortiz / S.5927 Hannon): This law increases the State's designation for comprehensive eating disorders from two to five years. This law was signed by the Governor on August 21, 2017 and took effect immediately.

(2) *Insurance-related*

- (a) Discounted Dental Services (Veto Memo 237 of the Laws of 2017; A.8141-A Cymbrowitz / S.6496-A O'Mara): This bill would have prohibited insurers and managed care organizations from using contract language that requires dentists to provide services at a fee set by or subject to the approval of the insurer, unless that service is part of the insurer's benefit package. This bill was vetoed by the Governor on December 18, 2017.
- (b) Coverage of Tomosynthesis (Chapter 414 of the Laws of 2017; A.5677 Seawright / S.4150 Griffo): The law clarifies that the existing requirement on health insurers to cover mammography screening would be extended to include tomosynthesis, which provides three-dimensional imaging to detect potential breast cancer. The Department of Financial Services has already required insurers to cover tomosynthesis, at least under certain circumstances, under a 2017 directive clarifying the existing mammography mandate. This law was signed by the Governor on November 29, 2017 and will take effect on January 28, 2018.
- (c) Municipal Notification for Changes in Health Insurance Plans (Veto Memo 194 of the Laws of 2017; S.4324 Tedisco / A.5210 Abinanti): This bill would have required public corporations to give notice within 45 days to retired employees and covered family members of any change in a health insurance plan and to provide a description of such change. Currently, there is no notice

requirement for such health insurance plans to public employee retirees unless it is required pursuant to a collectively bargained agreement. This bill was vetoed by the Governor on November 29, 2017.

*(3) Medicaid and Managed Care*

- (a) Coverage of Allergy Testing (Veto Memo 183 of the Laws of 2017; A.807 Perry / S.1222 Rivera): This bill would have required Medicaid coverage of serologic-specific tests when it has been determined that percutaneous skin tests are medically necessary to diagnose an enrollee's allergies. This would have allowed enrollees to receive allergy testing from their primary care physician, instead of being referred out to an allergy specialist. This bill was vetoed by the Governor on November 29, 2017.
- (b) Carve-out of School-Based Health Centers from Medicaid Managed Care (Veto Memo 235, A.7866 Gottfried/ S. 6012 Seward). This bill would have "carved-out" school-based health centers from the Medicaid managed care program. The centers were scheduled to be included within the Medicaid managed care program on July 1, 2018. Although the Governor vetoed the bill on December 18, 2017, he agreed to delay inclusion of these programs in Medicaid managed care until January 1, 2021.
- (c) Oxygen Therapy (Veto Memo 189 of the Laws of 2017; A.2906 Ortiz / S.3421 Parker): This bill would have required Medicaid coverage of topical oxygen wound therapy for chronic wound management if prescribed by a physician or other qualified prescriber. This law was vetoed by the Governor on November 29, 2017.
- (d) Coverage of Complex Rehabilitation Technology (Veto Memo 165 of the Laws of 2017; A.6120-B McDonald / S.4557-B Ort): This bill would have required Medicaid coverage of individually configured durable medical equipment for individuals with significant physical or functional impairment. This bill was vetoed by the Governor on October 23, 2017.
- (e) Carve-Out of Blood Clotting Factor Products (Veto Memo 156 of the Laws of 2017; A.7581 Gottfried / S.5774 Hannon): The bill would have prevented the "carving-in" of blood clotting factor and related services, on which persons with hemophilia and other bleeding disorders rely, into Medicaid managed care. Coverage of clotting factor had been provided on a fee-for-service basis for the approximately 200 Medicaid beneficiaries who require the product

since the inclusion of pharmacy benefits into Medicaid managed care, but the State's Medicaid program planned to incorporate the benefit into Medicaid managed care on July 1. This bill was vetoed by the Governor on June 28, 2017.

- (f) Enhanced Safety Net Hospital Program (Veto Memo 229 of the Laws of 2017; A.7763 Gottfried / S.5661-B Little): This bill would have established the “enhanced safety net hospital program”, which would have provided enhanced medical assistance payments to hospitals that serve a high proportion of medical assistance recipients or uninsured patients. To receive payments, a hospital must: (i) provide care to uninsured patients in its emergency room, hospital based clinics and community based clinics, (ii) provide community services, such as dental care and prenatal care; (iii) be a public hospital operated by a county, municipality, public benefit corporation or the State University of New York; or (iv) a federally designated critical access or sole community hospital. This bill was vetoed by the Governor on December 18, 2017.
- (g) Payments for Reserved Days (Veto Memo 238; A.8338 Gottfried / S.6559 Hannon): This bill would have allowed the Department of Health to continue making payments for “reserved bed days” in residential healthcare facilities as they did prior to the adoption of the SFY 2017-18 Enacted Budget, which directed the Department to cease making such payments. This bill was vetoed by the Governor on December 18, 2017.
- (h) Coverage of Clinical TBI Services (Veto Memo 202 of the Laws of 2017; A.8241 Morelle / S.6511 Hannon): This bill would have authorized medical assistance payments up to the Medicaid rate for clinical services received by individuals with traumatic brain injuries. Currently, payments for clinical services for individuals with traumatic brain injuries are made up to the Medicare rate for physician practices, which is 20-30% below the Medicaid rate. This bill was vetoed by the Governor on November 29, 2017.

*(4) Regulation of Healthcare Delivery*

- (a) Delivery of Telehealth in Educational and Adult Care Settings (Chapter 285 of the Laws of 2017; A.4703 Jenne / S.3293 Hannon; Chapter 238 of the Laws of 2017; A.1464-B Jenne / S.4285-A Serino): These laws both expand the “originating sites” from which patients may receive telehealth services. The first includes public private and charter elementary and secondary schools,

school-age child care centers and day care centers as originating sites. The second includes licensed adult care facilities licensed under Article VII, Title II of the Social Services Law. These laws were signed by the Governor on September 12, 2017 and August 21, 2017 respectively. These laws took effect immediately.

- (b) Rural Health Council (Chapter 419 of the Laws of 2017; A.7203 Jones / S.4741 Hannon): This law establishes a council on rural health, which would be charged with advising the Commissioner of Health on healthcare delivery in rural areas. The council would examine the impact of proposed programs, statutes, regulations, and healthcare reimbursement policies. This law was signed by the Governor on November 29, 2017 and took effect immediately.
- (c) Nurse-Family Partnership Program (Veto Memo 234 of the Laws of 2017; A.8388 Gottfried / S.6656 Hannon): This bill would have clarified that the Nurse-Family Partnership program—an evidence-based nurse home visiting program for at-risk first-time mothers—would not be required to satisfy the requirements applicable to home care agencies. After noting that the issue had been resolved in discussions between the program and the Department of Health, this bill was vetoed by the Governor on December 29, 2017.
- (d) Certificates of Public Advantage (Chapter 80 of the Laws of 2017; A.7748 Gottfried / S.5342 Hannon): The law extends the authority of the Commissioner of Health to issue Certificates of Authority to facilitate collaboration among healthcare facilities, under state supervision, without incurring antitrust liability. The existing authority to issue COPAs expired on December 31, 2016; under the law, the authority will be extended another four years, until December 31, 2020. This law was signed by the Governor on June 29, 2017 and took effect immediately.
- (e) Certificate of Need for Assisted Living Programs (Veto Memo 214 of the Laws of 2017; A. 7727-A Lupardo / S.5840 Hannon): This bill would have replaced a competitive solicitation process for assisted living programs with a new certificate of need program, which would have award beds based on demonstrated community need. The bill would have also authorized the Director of the Division of the Budget to impose a moratorium on the approval of new beds if their approval would result in a net increase in Medicaid expenditures. This bill was vetoed (and tabled) by the Governor on December 18, 2017.

*(5) Mental Health, Developmental Disability and Substance Abuse Services*

- (a) Kendra's Law (Chapter 67 of the Laws of 2016; A.7688 Gunther / S.6726 Young): This law extends the expiration of Kendra's law, which established a court-ordered assisted outpatient treatment program in New York State, from June 30, 2017 to June 30, 2022. This law was signed by the Governor on June 29, 2017 and took effect immediately.
- (b) Involuntary Care and Treatment (Chapter 198 of the Laws of 2017; A.7604 Gunther / S.6154 Ortt): This law amends the Mental Hygiene Law to clarify that an individual must "pose...a real and present risk of substantial physical harm to himself or herself or others" in order to be considered in need of involuntary care and treatment. This law was signed by the Governor on August 21, 2017 and took effect immediately.
- (c) OPWDD Care Demonstration Program (Chapter 491 of the Laws of 2017; A.7399 Gunther / S.5681 Ortt): This law requires the Commissioner of the Office for People with Developmental Disabilities to establish a care demonstration program. The demonstration program would offer community habilitation, in-home respite, pathways to employment, supported employment, and community prevocational services. This law was signed by the Governor on December 18, 2017 and took effect immediately.

*(6) Pharmacy and pharmaceutical regulation*

- (a) Safe Disposal of Controlled Substances (Veto Memo 247 of the Laws of 2017; A.387-B Gunther / S.6750 Hannon): This bill would have required chain and mail order pharmacies to operate safe drug disposal sites for the collection of unused controlled substances. This bill was vetoed by the Governor on December 18, 2017.
- (b) PTSD and Medical Marijuana (Chapter 403 of the Laws of 2017; A7006 Gottfried / S.5629 Savino): The law adds post-traumatic stress disorder (PTSD) to the conditions that would qualify a patient to receive a certification for medical marijuana. This law was signed by the Governor on November 11, 2017 and took effect immediately.
- (c) Practitioners Authorized to Certify Medical Marijuana Use (Chapter 438 of the Laws of 2017; A.2882 Peoples-Stokes / S.5627 Savino): This law directs the Department of Health to disclose the practitioners who have been



registered to certify medical marijuana use and make such information available on the Department's website. This law was signed by the Governor on November 29, 2017. This law will take effect on January 28, 2018. Refills of Non-controlled Substances (Veto Memo 159 of the Laws of 2017; A.6371-B Simanowitz / S.5171-B Felder): This bill would have authorized pharmacists to modify refills of prescriptions for non-controlled substances by dispensing a greater quantity of the indicated medication. The modified refill must not exceed a 90-day supply, or the amount authorized by the prescriber, and the pharmacist must notify the prescriber within forty-eight hours of dispensing the modified refill. This bill was vetoed by the Governor on October 23, 2017.

- (d) Interchangeable Biological Products (Chapter 357 of the Laws of 2017; A.7509-A Gottfried / S.4788-A Hannon): This law defines "biological product" and "interchangeable biological product" in the pharmacy provisions of the Education Law and would require the substitution of a less expensive biological product if it is interchangeable and has not otherwise been prohibited by the prescriber. This law was signed by the Governor on October 23, 2017. This law took effect immediately and will sunset after five years.

*(7) Regulation of the Professions*

- (a) Reporting on Nurse Practitioners (Chapter 409 of the Laws of 2017; A.834-B Gunther / S.3567-B Hannon): This law requires the president of the civil service commission to review the job title of nurse practitioner, and to determine whether it reflects nurse practitioners' current scope of practice and provides appropriate compensation. This law was signed by the Governor on November 29, 2017 and will take effect November 29, 2019.
- (b) Education Requirements for Registered Nurses (Chapter 502 of the Laws of 2017; A.1842-B Morelle / S.6768 Flanagan): This law requires registered professional nurses to either have or obtain a bachelor's degree in nursing within ten years of initial licensure. This law also creates a temporary nursing program evaluation commission to examine and make recommendations on barriers to entry into nursing. This law was signed by the Governor on December 18, 2017. The portion of the law establishing the temporary commission took effect immediately, whereas the section creating the bachelor's requirements will take effect June 16, 2018.

- (c) DNRs and Nurse Practitioners (Chapter 430 of the Laws of 2017; A.7277-A Gottfried / S.1869-A Hannon): This law adds nurse practitioners to the list of healthcare practitioners authorized to execute orders not to resuscitate and orders relating to life-sustaining treatments. This law was signed by the Governor on November 29, 2017 and will take effect on May 28, 2018.

*(8) Child care and children's services*

- (a) Impact of Tax Deductions for Adoption of Special Needs Children (Chapter 382 of the Laws of 2017; A.6800 Joyner / S.4492 Golden): This law requires the Office of Children and Family Services to complete a report analyzing the impact of a tax deduction for expenses associated with the adoption of a special needs child. The report would include: (i) how many special needs children have been adopted in the past ten years, (ii) the average waiting periods for adopting special needs children, (iii) the per year out-of-pocket expenses incurred by adoptive parents, and (iv) the existing benefits available to adoptive parents. This law was signed by the Governor on October 23, 2017. This law took effect on November 22, 2017.
- (b) Online Listing of Afterschool and Child Care Programs (Chapter 424 of the Laws of 2017; A.2183 Mayer / S.683 Kennedy): This law requires the Council on Children and Families to develop a listing and map of all afterschool and school age child care programs that receive funding from the state, and make such list available to the public. This law was signed by the Governor on November 29, 2017 and will take effect on February 27, 2018.
- (c) Child Care Availability Taskforce (Chapter 493 of the Laws of 2017; A.7726-A Jaffee / S.5929 Avella): This law establishes a child care availability taskforce, which is be charged with evaluating and determining the need for child care throughout the state. The taskforce is also required to examine: (i) access to and the cost of subsidized child care, (ii) availability of child care for non-traditional work hours, (iii) whether parents are voluntarily leaving the workforce due to lack of affordable or accessible child care, (iv) whether employers have identified lack of child care as a reason for a shortage of a qualified workforce; and (v) the impact of child care on economic development throughout the state. This law was signed by the Governor on December 18, 2017 and took effect immediately.

*(9) Organ donation and transplantation*

- (a) Lauren's Law (Chapter 332 of the Laws of 2017; A.5179 Ortiz / S.1206 Carlucci): This law makes the provisions of Lauren's Law permanent by removing the current three year sunset on the bill. Lauren's Law requires all applicants for driver's licenses or renewals to make an affirmative choice as to whether they would like to register as an organ, eye, and tissue donor in the New York State Donate Life Registry. This law was signed by the Governor on October 16, 2017. This law took effect immediately.
  - (b) New York State Transplant Council (Chapter 26 of the Laws of 2017; A.5132 Gottfried / S.2495 Hannon): This law would expand the authority of the New York State Transplant Council by directing it to make recommendations related to organ, eye, and tissue donation. This law would also require the council to make yearly reports to the Commissioner of Health. This law was signed by the Governor on May 12, 2017 and took effect immediately.
- (10) *Educationally-related legislation*
- (a) New York STEM Incentive Program (Veto Memo 207 of the Laws of 2017, A.1808-A Morelle / S.2466 LaValle): This bill would have expand the eligibility of the New York State science, technology, engineering and mathematics incentive program to include students enrolled at private colleges and universities. This bill was vetoed (and tabled) by the Governor on December 18, 2017.
  - (b) Institutional Accreditation (Veto Memo 242 of the Laws of 2017; A.8491 Glick / S.6780 LaValle): This bill would have clarified that the State Education Department has the authority to collect fees from institutions of higher education that are seeking accreditation services from the Department, and would establish that the Department may deposit such revenues into a newly created "Board of Regents institutional accreditation account". This bill was vetoed by the Governor on December 18, 2017, who noted that he would support the continuation of the accreditation program, which could charge fees if necessary.
  - (c) Five-Year Capital Plans for SUNY and CUNY (Veto Memo 205 of the Laws of 2017; A.967 Glick / S.1625 LaValle): This bill would have required the Governor to submit a five-year capital plan for the SUNY and CUNY systems that would meet one hundred percent of the critical maintenance needs for each SUNY-operated campus and CUNY senior college. This bill was vetoed by the Governor on December 18, 2017.

(11) *Housing-related legislation*

- (a) New York State Housing and Mortgage Agencies (Chapter 89 of the Laws of 2017; A.8259 De La Rosa / S.6414 Little): This law, which was a Division of Housing and Community Renewal Departmental bill, extends the statutory authorizations of the New York State Housing Finance Agency (HFA), the State of New York Mortgage Agency (SONYMA) and the SONYMA Mortgage Insurance Fund (MIF) to issue bonds, finance or enter into other financial arrangements for housing purposes. The law also increases the bonding authority of HFA by \$2.5 billion to a maximum of \$26.780 billion. This law was signed by the Governor on July 21, 2017 and took effect on that date.
- (b) Affordable Residential Green Building Program (Chapter 486 of the Laws of 2017; S.3746-A Griffo / A.4969-A Rosenthal): This law requires the New York State Energy Research and Development Authority to develop a program to provide incentives to owners for the construction of new residential buildings which are affordable and promote smart growth and smart planning, reduce greenhouse gas emissions, reduce energy consumption and achieve other energy efficient standards. This law was signed by the Governor on December 18, 2017 and took effect immediately.
- (c) Allowable Maximum Income (Chapter 131 of the Laws of 2017; S.4628 Savino / A.7463-A Kavanagh): This law increases the allowable maximum income for seniors and disabled living in New York City from \$29,000 to \$50,000 in order to be eligible for the Senior Citizen Homeowners' Exemption (SCHE) and the Disabled Homeowners' Exemption (DHE) tax abatement. This law was signed by the Governor on July 25, 2017 and took effect immediately, and applies to exemption applications for the city 2017 fiscal year.

(12) *Medical Malpractice*

- (a) Malpractice Actions Related to Cancer Diagnoses (A.8516 Weinstein/ S.6800 DeFrancisco): This is the only 2017 bill on which the Governor has not yet acted. The bill would extend the statute of limitations in medical malpractice actions involving cancer misdiagnoses to the date the malpractice was discovered, rather than when it occurred. The bill would allow for medical malpractice actions premised on the negligent failure to diagnose a malignant

tumor or cancer to be commenced within two and one-half years from when the plaintiff *knew or reasonably should have known* of the negligence, provided that the action is commenced no more than seven years after the negligence occurred. While the Governor has publicly expressed support for the bill—known as “Lavern’s Law,” named for an individual whose opportunity to assert a claim for malpractice was precluded by the current statute of limitations—it is expected that some amendments may be advanced in the coming days or weeks to address some of the bill’s ambiguities and technical issues. This bill has passed both houses, and was sent to the Governor on December 29, 2017. This bill would take effect immediately.

D. A Preview of the 2018 Legislative Session

- (1) *State of the State*: The Governor’s State of the State message touched on a wide range of issues, including strengthening the State’s laws on sexual harassment, curtailing new investments by State pension plans in entities with significant fossil fuel-related activities, new proposals to address the burden of student loans, additional initiatives to combat opioid epidemic and additional economic development efforts. The Governor also indicated that the Administration is considering means to mitigate the impact of the provisions of the federal tax reform statute that will eliminate the state and local tax deductions through the use of payroll taxes and charitable contributions.
- (2) *Fiscal and budgetary issues*: Given the current fiscal environment, a challenging budget-making process may dominate the 2018 legislative session—caused by a downturn in state revenues and either actual or potential reductions in federal support. Projections of the next year’s deficit range from \$4.5 billion to much higher amounts. The Governor released his budget proposals on January 16<sup>th</sup>, which would, among other things:
  - (i) Establish Healthcare Shortfall Fund to offset federal healthcare cuts, funded through the proceeds of the proposed Fidelis conversion and sale to a for-profit insurance company, Centene;
  - (ii) Impose a Healthcare Insurance Windfall Profit Fee to capture the savings in federal corporate taxes realized by New York health insurers;
  - (iii) Expand the Office of the Medicaid Inspector General’s authority to recover overpayments from managed care organizations and aligning the penalties under the State’s False Claims Act with federal penalties;

- (iv) Authorize the provision of healthcare services in retail settings, define the range of services that might be provided, and require the provision of services without discrimination as to source of payment and accreditation;
- (v) Permit the State to make programmatic changes to the Child Health Plus program if federal funding is reduced or eliminated; and
- (vi) Implement a number of proposals recommended by the Regulatory Modernization Initiative, including (a) authorizing emergency medical personnel to provide care in certain settings, (b) encouraging the integration of primary care with mental health and substance use disorder services and (c) expand the use of telehealth services by including among “originating sites” the patient’s home or any other location where the patient may be located.

(3) *Progressive Agenda:* The Governor and his Democratic allies are likely to seek consideration of the DREAM Act, criminal justice reforms (e.g., bail reform), the reproductive health agenda, campaign finance and ethics reforms and a single payor health plan, all of which were cited by the IDC as issues that should be considered if there is a reunification of the Senate Democrats. Other bills that have stalled in the past several years are likely to be debated again, including safe staffing/ nurse-patient ratio bills, child victims legislation (addressing the statute of limitations in child sexual abuse cases), GENDA (prohibiting discrimination based on gender identity), and medical aid in dying legislation, a bill that would provide the authority for physician assistance in dying that New York’s highest court recently declined to recognize.

(4) *Playing defense:* New York may also consider steps to address the Trump Administration’s continued efforts to dismantle the Affordable Care Act. Consideration might be given to implementing a New York State individual mandate—like the one in Massachusetts on which the ACA was modeled—to replace the repeal of the federal individual mandate that was part of the tax reform legislation enacted by Congress. State initiatives may also be considered to protect New York against other healthcare threats, such as the implementation of Disproportionate Share Hospital payment cuts, the destabilization of the Obamacare insurance exchanges, the potential interruption in funding for the Child Health Insurance Program and community health centers, changes to the 340-B drug program, and the threatened defunding of Planned Parenthood.

## II. Federal Legislative/Administrative Update

### A. Reprise of Repeal and Replace

1. *Obama era repeal efforts*: Over 70 votes by Congress to repeal the ACA between 2011-2016.
2. *American Health Care Act (AHCA)*: Passed by House of Representatives in May, 2017, AHCA would have resulted in \$44 billion reduction in Medicaid funding, 2017-26.
3. *Better Care Reconciliation Act (BCRA)*: Never brought to a vote in the U.S. Senate, BCRA died in July, 2017. It would have cut \$40 billion in Medicaid funding, 2017-26.
4. *Graham-Cassidy*: Bill was defeated in Senate in September, 2017 and would have caused a 54% reduction in Marketplace and Medicaid funding.
5. *Alexander-Murray*: Bill was aimed at stabilizing ACA exchanges, remains pending.
6. *Tax Cut and Jobs Act*, the federal tax reform legislation repeals the ACA's individual mandate penalty, effective 1/1/2019. CBO estimates 10% premium increase and 13 million fewer Americans with coverage.

B. Current Federal Status

1. *Budget shutdown and programs in the lurch*: With the next government funding deadline looming on January 19, Congress continues to focus on long-term funding for the government; the outcome of these conversations will determine the fate of the Children's Health Insurance Program (CHIP), community health center funding, and several other health care provisions.
2. *Alexander-Murray*: Just as Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) are reengaging on talks about their Marketplace stabilization legislation, a March document came to light that was initially described as a revelation about the Administration's efforts to undermine the Affordable Care Act (ACA). The document details strategies to limit Marketplace enrollment (such as tightening eligibility standards and cutting outreach efforts), but it also lists strategies designed to stabilize the Marketplaces. Most notably, the March 2017 document calls for supporting 1332 reinsurance waivers as a way to reduce premiums/

3. *CHIP and other health funding issues:* The major focus in Congress this week remains on securing an agreement to extend funding for the government beyond January 19. The funding bill could again be a vehicle for various health policy provisions, including community health center funding, delay of scheduled Medicaid disproportionate share hospital (DSH) cuts, and several Medicare extenders. Whether the next government funding bill will carry a long-term CHIP extension is a key question as states again confront looming funding shortfalls. Although Congress provided approximately \$3 billion in December to temporarily patch CHIP funding, health policy experts report that at least 10 states and DC will run out of funds by the end of February, and approximately half of all states will run out of funds in March. Last week's updated Congressional Budget Office (CBO) score of a five-year CHIP extension might ease the path to approval, since estimates updated to reflect the impact of individual mandate repeal show that a five-year CHIP extension would increase the deficit by \$800 million over the next decade, a sharp decline from the earlier \$8.2 billion estimate. Senate Finance Committee Chairman Orrin Hatch (R-OR) has strongly championed rapid passage of a CHIP extension and this week expressed his view that the broader budget issues should not prevent immediate action on CHIP.

4. *340B:* House Energy and Commerce Committee Republicans released a report outlining findings and recommendations related to oversight of the 340B Drug Pricing program (340B program), including a call for Congress to "clarify the intent of the 340B program" and to provide increased regulatory authority to the Health Resources and Services Administration (HRSA) for program oversight/ Meanwhile, hospital industry leaders filed a notice of appeal in response to the December 29 U.S. District Court dismissal of a request for injunction to block reductions to the 340B drug discount program that took effect January 1.

C. Executive:

1. *Executive Orders and Actions:* On his first day in office, President Trump signed an Executive Order, directing executive agencies to lessen the burdens of the ACA, where possible. In October, after Congress was unable to pass any of the various attempts at "repeal and replace," he took a number of actions to undermine the law, including shortening open enrollment and severely cutting funding for outreach and enrollment services. In addition, the President announced two new measures expected to significantly weaken the ACA: an executive order creating avenues for healthy enrollees to buy less comprehensive



coverage (and therefore weakening the Marketplace risk pools), and a decision to immediately terminate cost sharing reduction (CSR) payments.

2. *Guidance on Work Requirement Provisions in Medicaid 1115 Waivers.* On January 11, CMS released long-anticipated guidance to states with regard to crafting and implementing section 1115 waiver demonstrations that require work and community engagement as a condition of qualifying for health care coverage through the Medicaid program.

3. *Senate Confirmation Hearing for HHS Secretary Nominee Alex Azar.* HHS Secretary nominee Alex Azar appeared before the Senate Finance Committee on Tuesday and, while the hearing included intense questioning, the Committee is expected to endorse his nomination. Mr. Azar offered signals about his stance on several policy priorities, along with support for at least some provisions of the previously failed Graham-Cassidy legislation, including “allowing states to run their own budgets.”

4. *Reinsurance Waivers 2.0.* After three reinsurance waivers were approved in 2017, a number of states are considering similar waivers this year, including Idaho, which posted a 1332 waiver proposal including reinsurance in late 2017; Washington, which held a legislative hearing on reinsurance this week; Maine, which is seeking to reinstate its pre-ACA program; and Colorado, where legislation will be considered this year. If the federal government were to provide additional federal support, such as the legislation introduced by Senators Susan Collins (R-ME) and Bill Nelson (D-FL) would do, state interest in reinsurance would likely expand dramatically.