

## Memorandum in Opposition

S8307 (Budget)

February 8, 2024

A8807 (Budget)

Effective Date: Immediately

**BUDGET BILL:** Budget Article VII, Part G

**LAW AND SECTIONS REFERRED TO:** Section 3614-c of the Public Health Law; repealer

NYSBA's Elder Law and Special Needs Section strongly opposes the elimination of wage parity increases for New York, Nassau, Suffolk, and Westchester counties.

NYSBA Elder Law & Special Needs Section represents some of the most vulnerable New Yorkers, including those reliant upon the Consumer Directed Personal Assistance Program (CDPAP) system. In the wake of the COVID-19 pandemic, New York continues to realize a severe shortage of home care workers.<sup>1</sup> This proposal will further diminish the workforce in an already strained system. In the next decade, an estimated 300,000 more older adults will require the assistance of home care workers.<sup>2</sup> Increasing pay for home care workers is crucial to ensure that medically necessary home care approved by Medicaid programs can be provided. The Governor and legislature have recognized this demand and over the last few years increased the minimum wage by \$2 per hour and imposed wage parity requirements. Even with these initiatives, the worker shortage continues.<sup>3</sup> These wage increases have already been diminished, especially for CDPAP workers. Last year, CDPAP home care workers in New York City, Long Island, and Westchester saw wage parity cut by excluding them from the \$2 increase in the minimum wage. The new proposal would reduce the wage and compensation for CDPAP personal assistants by \$2.54/hour, or twelve percent (12%). The result is a wage LESS than what they were earning in 2018. This means that home care workers will have not had a single increase in their wages to combat inflation over the past six (6) years, but instead have suffered a decrease in their base wages.

<sup>1</sup>Amanda D'Ambrosio, Jacqueline Neber, Report: NY could be nearly 1.5 million home health care workers short of serving state's aging population, Crain's NY Business, Mar. 24, 2023, available at [https://www.nytimes.com/2022/03/30/opinion/home-care-aides-industry.html?referringSource=articleShare](https://www.crainsnewyork.com/health-pulse/report-ny-could-be-nearly-15-million-home-health-care-workers-short-serving-states#:~:text=In%20the%20next%20decade%2C%20there,health%20assistance%2C%20the%20institute%20said;Ai-jenPooandIlanaBerger,ManyofUsWanttoAgeatHome.ButThatOptionIsFadingFast, NY Times, Mar. 30, 2022 (Opinion Guest Essay), available at <a href=).

<sup>2</sup>Emily Phiser, PhD, Workforce Report: Labor Shortage Mitigation in New York's Home Care Sector, Fiscal Policy Institute, March 2023, available at <https://fiscalpolicy.org/wp-content/uploads/2023/03/Fiscal-Policy-Institute-March-2023-Workforce-Report-Labor-Shortage-Mitigation-in-New-Yorks-Home-Care-Sector-1.pdf>

<sup>3</sup>See <https://www.nyc.gov/assets/dca/downloads/pdf/workers/Lifting-up-Paid-Care-Work.pdf>

The proposed reduction in wages will make it difficult and even impossible for consumers to recruit and hire CDPAP personal assistants, since these workers can earn more in jobs that are much less physically and emotionally taxing than caring for people who have physical and mental disabilities.

This cut will have a disproportional impact on women who are black, indigenous, and other people of color (BIPOC), who make up the vast majority of the home care work force.<sup>4</sup> In turn, this wage reduction will harm their families, and the diverse communities they serve. If further wage cuts are made, the people that we rely on to take care of our most vulnerable and disabled adults will be unable to take care of themselves and their own families.

Replacing CDPAP as a model and instead solely employing home care workers through the Managed Long Term Care plans is not manageable for the reasons set forth below.

**Capacity** - We question whether capacity exists to deliver traditional personal care services as needed. In 2018, in the metropolitan area affected by this proposal, the percentage of members who received CDPAP as opposed to personal care was 48.4% for Integra MLTC, 43.1% for Alphacare (which was since acquired by Senior Whole Health)<sup>5</sup>, 36.7% for Fidelis, 34% for Centers Plan for Healthy Living, and 25% for Agewell (since acquired by Senior Whole Health).<sup>5</sup> The proportion of members receiving CDPAP versus personal care has reportedly increased since then, especially with the worker shortage caused by the COVID-19 pandemic. With such a high percentage of CDPAP utilization, the Governor’s proposal fails to provide assurances that MLTC’s have the capacity to meet consumer needs.

**CDPAP is indispensable for consumers with “skilled” needs.** Many consumers must use the CDPAP program because their personal assistants must perform “skilled” tasks that a traditional aide may not perform. These include injecting insulin or administering eye drops, oxygen, medications, tube feeding, and other tasks. The CDPAP program achieves substantial cost savings for the State by permitting CDPAP assistants to perform these tasks at a far lower cost than a private duty nurse. The projected cost savings is \$200 million in 2025 and more in later years. At least some CDPAP consumers who need skilled services will be forced into nursing homes if they are unable to recruit and hire personal assistants, at greater cost to the state and violating their rights under the Americans with Disabilities Act as interpreted by the U.S. Supreme Court in *Olmstead*.

<sup>4</sup> See <https://www.nyc.gov/assets/dca/downloads/pdf/workers/Lifting-up-Paid-Care-Work.pdf>.

<sup>5</sup> Data from NYS Managed Care Cost & Operating Reports (MMCOR) filed by MLTC plans for 2018. Data is visualized interactively in Long Term Care Service Mix at <https://nylag.org/mmc-cor-long-term-care-service-mix/>. The cited data is obtained by viewing the data by Percent rather than Numbers, by selecting the NYC Metro region, and in the Services dropdown selecting *PCS* only and *CDPAP* only. This is one of the interactive visualizations in the *NYLAG MLTC Data Transparency Project*, available at <https://nylag.org/MLTCdatatransparency/>. Complete project report available at <https://nylag.org/wp-content/uploads/2022/09/MMCOR-Report-FINAL.3.pdf>.

**Violate the Right Enacted in State Law Guaranteeing Consumer Choice.** By making it difficult, if not impossible, to recruit and hire CDPAP personal assistants, this budgeting change would violate the state law establishing the CDPAP program, which “...is intended to permit chronically ill and/or physically disabled individuals receiving home care services under the medical assistance program greater flexibility and freedom of choice in obtaining such services.” Soc. Serv. Law. 365-f, Subd. 1. Flexibility and freedom offered by the CDPAP program is vital to each consumer’s individual needs. It allows them to choose someone they can trust, communicate with, and who shares their cultural values to assist with their most private (bathing and toileting) needs, while maintaining their autonomy and dignity. The law provides, “All eligible individuals receiving home care shall have the opportunity to apply for participation in the program.” Sec. 365-f, Subd. 2. A consumer’s right to apply is meaningless if it is impossible to hire and retain a personal assistant.

The Executive Memorandum in support offers the spending cap as justification for this significant cut. However, there are more efficient means by which to remain within the cap. For example, the Home Care Savings and Reinvestment Act (S7800/A8470) would save many times the projected savings of this wage cut by replacing the MLTC program with a managed fee for service model. Similarly, adopting better oversight of plans as recommended by the NYS Comptroller would save more money without harming consumers and workers.<sup>6</sup>

The Elder Law Section firmly stands with CDPAP workers and opposes the elimination of wage parity. To eliminate wage parity during a period of population growth in need of these workers is dangerous. It directly harms persons of color, those living in rural areas, and eliminate consumer choice, as guaranteed by state law. CDPAP workers are indispensable to our most vulnerable population and an elimination of wage parity would be an egregious blow to the well-being of these workers, their families, and the chronically ill and/or physically disabled individuals they serve daily.

Based on the foregoing, the Elder Law and Special Needs Section OPPOSES this legislation.

<sup>6</sup> The report found the “... Department does not perform reviews to identify instances where MLTC members remain in MLTC but receive few services during their enrollment period...The Department should consider a process to determine the reasons such limited services were received, and ensure members are receiving the required level of care...” NYS Comptroller Report, *supra* at fn 2 at page 13.