NEW YORK STATE BAR ASSOCIATION
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Via Electronic Delivery

RE: NYSBA Elder Law & Special Needs Section Supports Expansion of the MBI-WPD Program and Recommends Some Modifications to Ensure Access

NYSBA Elder Law & Special Needs Section supports expansion of the Medicaid Buy-In for Working People with Disabilities (MBI-WPD) to include people age 65 and over, and expansion of the income and asset limits for this important program.

The draft waiver amendment cites important research findings documenting the high unemployment rate for people with disabilities. When a person with a disability does find work, the availability of Medicaid is critical-- 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.

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. Those who reach age 65 and have Medicaid must transition from the Buy-In to the stricter regular eligibility rules with income limits at 138% FPL instead of 250% FPL, thus burdening them with a high spend-down they cannot afford. Also, they must start withdrawing distributions from their retirement benefits, instead of letting them grow as allowed under NYS's MBI-WPD.

We are supportive of NYS's increase of the asset limit to $300,000. We believe this to be a positive step in bringing the limit closer to alignment with the $1 million home value allowance for Medicaid LTSS recipients and hope that it will lead in a promising direction for future policy. Additionally, we support waiving a spouse's income and resources. This will effectively end the "marriage penalty" that people with disabilities are subject to, forcing them to decide between retaining assets or legally marrying the person they love.

We make the following recommendations for how this important expansion is implemented.

1. **Monthly Premium –**
    a. Neither the state statute that authorizes this waiver expansion nor the proposed waiver amendment state whether the cap on the premium is based on the percentage of net or gross income. Since every other reference in the amended statute is to "net available income," the premium should be capped at the specified percentage of net available income.
    b. As the proposal states, 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. Social Security Act §1916(g)(1)(B). For people with incomes from 400% to 449% FPL, NYS would impose a premium of 8.5%. At all other income ranges the state's proposal is compliant with the TWIIA 7.5% cap. We urge that the premium schedule be modified to be consistent with the TWIIA 7.5% cap for incomes between 400 - 450% 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 ($50 for couples) for those with income 150% - 250% FPL will be repealed and/or not take effect. SSL 367-a, subd. 12.

2. **Family Size --** 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. 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). All of the cases required non-eligible spouses to be counted in the household size, but the same reasoning as to other family members is applicable, especially dependent minor children.

3. **Cap on Number Enrolled Should Not Include Those Eligible Under Existing Criteria.** The proposed 30,000-member cap warrants clarification regarding existing MBI-WPD beneficiaries. While current enrollment is 12,500 with projected annual growth of 2,195 (accounting for natural attrition), the cap could eventually impact both expansion enrollees and those eligible under current criteria (250% FPL). To maintain fairness, we recommend the cap apply only to expansion enrollees, preserving access for those meeting current State plan criteria.

4. **Medical Improvement Group** – The amended state law continues to have a Basic group and a Medical Improvement Group, as allowed by TWIAA and as in the current program.

NY Soc. Serv. Law, subd. 16(c). –

(c) An individual at least sixteen years of age who: is employed;
ceases to be eligible for participation in such waiver pursuant to paragraph (b) of this subdivision because the person, by reason of medical improvement, is determined at the time of a regularly scheduled continuing disability review to no longer be certified as disabled under the social security act; continues to have a severe medically determinable impairment, to be determined in accordance with applicable federal regulations; and contributes to the cost of medical assistance provided pursuant to this paragraph in accordance with paragraph (d) of this subdivision, shall be eligible for participation in such waiver. For purposes of this paragraph, a person is considered to be employed if the person is earning at least the applicable minimum wage under section six of the federal fair labor standards act and working at least forty hours per month.

This provision could be read to classify every individual age 65 and over as being in the Medical Improvement Group, rather than in the Basic group, since no one age 65 or over may be certified as disabled under the Social Security Act. 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. They should be classified in the Medical Improvement Group only if they are determined, by reason 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 in order for the MBI-WPD to be a work incentive for people age 65 and over, who may not be able to work 40 hours/month with minimum wage, but nevertheless can and want to continue to work.

Thank you for the opportunity to submit this testimony. Please feel free to contact our Government Relations Department at GR@nysba.org or our General Counsel David Miranda at dmiranda@nysba.org with any questions.

Respectfully,

NYSBA Elder Law and Special Needs Section