



Center for Justice & Democracy
90 Broad Street, Suite 401
New York, NY 10004
Tel: 212.267.2801
centerjd@centerjd.org
<http://centerjd.org>

GOVERNOR'S MEDICAID TEAM CONSIDERING NEW "BABY TAX" TO SUBSIDIZE MALPRACTICE AT UNSAFE HOSPITALS

BRAIN-DAMAGED BABIES AND MOMS TO SUFFER MOST

Governor Andrew Cuomo new Medicaid Redesign Team, which is dominated by hospital and industry lobbyists, is seriously considering recommending a proposal (#131) to severely limit patients' legal rights, including brutal "caps" on non-economic compensation and a birth injury fund that would be funded by a surcharge on liability insurance companies. This new "Baby Tax" would presumably be passed onto all of the states' insurance consumers, including small businesses.

This proposal was apparently worked out behind closed doors with hospital lobbyists and may be presented as part of the state budget deal without any public airing. Because the process is completely closed, only the sketchiest of details are being made available publicly, particularly regarding the birth injury fund. However, based on ideas that have circulated in the past and what limited details have been made available, the following analysis is relevant.

In brief, this proposal would be horribly unfair for babies and moms, make a complete mockery of the jury system, transfer many costs of medical malpractice from wrongdoers and their insurers to the state and/or all liability insurance consumers, create a windfall for hospitals on the Team, and put the state in the shocking position of subsidizing the commission of medical malpractice.

This proposal would place cruel new burdens on those caring for innocent babies, who are already sick or in need of medical care, forcing them to beg for money to which they are entitled under law.

Under one possible scheme, the state would set up a "Rube Goldberg"-type system for moms and newborns to cover costs for their future medical care *after* the family endured the time and expense of proving their case in court, and the health care provider was found negligent. The primary source of care may or may not fall to state Medicaid. After Medicaid, a fund would be set up, financed by a surcharge or "tax" on liability insurance companies (and presumably then passed onto all insurance consumers, including individuals and small businesses).¹

Under this system, the baby's family and her attorney would be required to expend the time, effort and expert fees to prove monetary damages that the patient will never receive and for which the attorney can never be paid, since there will be no monetary amount going to the patient for these damages. This is an intentional disincentive to bring legitimate and necessary lawsuits so that the wrongfully injured are compensated.

Even if the patient and attorney were able to bring a lawsuit, it appears that a patient, or the family of a sick or injured child, would be condemned to a lifetime of fighting just to get bills paid: first with his or her own health insurance company each time funds were needed,

and if that failed, perhaps fighting with Medicaid, and if that failed, continuing this burdensome and humiliating struggle to get funds from this new insurance-funded entity.

Patient claims would then be decided not by an unbiased judge or jury, but by an unaccountable entity with a financial incentive to deny claims or cut costs, and a bias influenced by the earlier decisions to deny compensation. There would be no procedural safeguards for the patient, likely no legal representation, and no meaningful appeals process.

Health insurers routinely deny needed care or shortchange consumers. In fact, all the major health insurers were sued by then New York Attorney General Cuomo for systemically cheating customers out of hundreds of millions of dollars by fabricating bogus out-of-network rates. This plan would leave injured patients vulnerable to similar devices.

Those who would shoulder the burden of this new system would be the most seriously injured victims of medical malpractice, catastrophically-injured newborns.

These children were injured through no fault of their own but rather through negligent or reckless practices. The law should entitle them to the same kind of recourse for injury as any other victim of medical negligence. Adult men have nothing to fear from this system.

Even if money exists today to fund the system, it will not in the future.

History is absolutely clear that even if a system starts with good intentions and is properly funded (a big “if” given the state’s economy), putting compensation for wrongdoing into a insurance-funded system eventually subjects it to influence-peddling and future budgetary/solvency considerations that no lawmaker today can control. There are many examples of this occurring, including workers compensation,² whose fiscal problems are typically solved by reducing benefits and increasing obstacles for workers, or Virginia’s Birth-Related Neurological Injury Compensation Program, in fiscal crisis for years.³

The state will be subsidizing medical malpractice instead of trying to stop it.

Neither the state nor New York’s insurance consumers should be subsidizing unsafe hospitals and negligent doctors who commit malpractice. Yet by transferring many costs elsewhere, this is exactly what this plan would do. In fact, the 82 percent of doctors who have never made a malpractice payment derive no benefit at all from this; conversely, the 4 percent of New York doctors who account for 49.6 percent of medical malpractice payouts, and all of the state’s unsafe hospitals, would make out like bandits.⁴

NOTES

¹ Because of the secrecy of the Medicaid Redesign Team process, no one knows whether this scheme would affect other wrongdoers, such as a drug company whose unsafe drug or device contributed to the birth injury. They might also be off the hook by arguing that future medical costs for the injuries they helped cause are already being covered.

² See, “Worker’s Comp: Falling Down on the Job,” *Consumer Reports*, 2000; McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation “Reform,” 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998); Center for Justice & Democracy, *Workers Compensation – A Cautionary Tale*, 2006. [http://centerjd.org/lib/Workers'Comp\(NY\).pdf](http://centerjd.org/lib/Workers'Comp(NY).pdf).

³ Anita Kumar, “Free Care for Life, If Money Holds Out; Va. Scrambles to Find Funds for Program That Aids Children Injured at Birth,” *Washington Post*, March 6, 2008; Bill McKelway, “Plan could restore financial soundness,” *Richmond Times Dispatch*, September 17, 2007.

⁴ Public Citizen Study, “A Self-Inflicted Crisis: New York’s Medical Malpractice Insurance Troubles Caused by Flawed State Rate Setting and Raid on Rainy Day Fund” (November 2007).