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The Right Rx for Hospitals: State's Malpractice Reforms are Long Overdue

By Dr. Kenneth L. Davis

It was a historic weekend in Albany. The New York State Legislature and Gov. Cuomo agreed on a budget framework needed to reduce and cap Medicaid spending and eliminate the \$10 billion budget deficit.

Just as historic is something that hasn't made nearly as many headlines: As a direct result of the Legislature's actions, for the first time ever, malpractice costs to New York hospitals are going to be cut—by more than \$320 million in the coming year alone. Some crucial details are still being worked out, but we are hopeful that the reform package will give hospitals a break from major Medicaid budget cuts in the coming years.

As the reforms come under criticism in the days and weeks ahead, it's vitally important New Yorkers understand why these changes are so important to the well-being of our hospitals—and ultimately to the health of New Yorkers themselves.

Since 2000, escalating taxes, budget cuts and malpractice costs have forced 29 hospitals to close in New York State. Since 2007, hospitals statewide have endured \$1.3 billion in Medicaid reductions and tax increases. Hospitals now spend nearly \$1.6 billion a year on malpractice insurance—a figure that, absent reforms, was expected to increase by 10% a year. The only way our fragile hospital system—one that has had many tragic closings recently—could sustain additional cuts was to relieve a portion of its malpractice expenses.

That's what the budget deal delivered. It's not perfect, but it's a huge advance.

Legislators made a mistake by rejecting a proposal for a \$250,000 cap on noneconomic damages, endorsed by both the governor and the Medicaid Redesign Team. That would have moderated settlement amounts and reduced much of the variability among awards.

At least 26 states have reduced malpractice costs through similar caps, and Congress is considering such a cap on federal cases. The cap would have lowered malpractice rates to New York hospitals by an estimated \$384 million a year. New York State leads the nation in the size of its malpractice settlements, although the number of cases does not differentiate New York from any other state.

But equally important—and fortunately passed—is a landmark medical indemnity fund for neurologically impaired infants. Obstetrics accounts for 10% of hospital admissions, but 35% to 50% of malpractice costs. That's due in large part to babies born

with certain impairments, despite the fact that studies show the vast majority of these unfortunate outcomes are neither the fault of the doctor nor the hospital.

The indemnity fund—rather than Medicaid, as is often the case—will finance current and future health costs for neurologically impaired infants whose families pursue lawsuits against their obstetrician and hospital.

Right now, as the insurer for half the pregnancies and deliveries in New York State, Medicaid covers the medical costs for about 200 neurologically impaired infants whose cases go to court each year. That's because once a suit is filed, Medicaid pays all patient costs, about \$50,000 per case per year, until a settlement is reached.

The costs add up. It takes on average 7½ years for a case to be settled, and even after a settlement is decided, about half the cases continue to receive Medicaid financing while the hospital's funds—those assigned to cover the patient's bills—are placed in a trust. This system of continuous payment, and in many cases superfluous payment, is unconscionable and unsustainable. Under this plan, families can still sue, and lawyers' fees remain unchanged.

In addition to enormous savings to taxpayers, the establishment of this new fund has encouraged some medical malpractice insurers to say the previously unimaginable: that they would actually grant reductions amounting to tens of millions of dollars in hospital premiums. This is because medical expenses for successful plaintiffs will now be covered by the indemnity fund, rather than by jury-awarded lump sums that are based on projections and estimates. Currently, most medical malpractice verdicts and settlements are based on the projected costs that a patient may or may not incur over a lifetime of treating a condition, and typically these far exceed what an injured plaintiff actually uses.

This first-ever rollback in premiums is historic. It is expected to reduce hospital malpractice costs by \$320 million statewide. This is a necessary dent in the Medicaid cuts we will sustain under this reform package. It is also, I hope, a first step toward meaningful and mutually beneficial malpractice reforms.

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