April 14, 2020

New York State Executive Budgeting "Super Powers"

In this year's enacted budget for State Fiscal Year 2020-2021, there was language effectively investing the Executive with budgeting "super powers" – essentially allowing the adjustment of spending levels throughout the year. These powers were deemed necessary due to the uncertainty brought by the COVID virus: the impact on the Medicaid budget and State revenues, and the possible influx of federal funds.

There were two separate "super power" mechanisms – one for the overall State budget, and one for Medicaid (which was a pre-existing power, but which was further amended and streamlined this year). This paper walks through the process for how these powers can be invoked, and what they allow the Executive to do.

Authority to Adjust the Overall State Budget

The Aid to Localities appropriations bill contains the appropriations for all the programs and initiatives operated by every State agency and authority.[1] It is important to note that the Budget Director must certify that the budget is in balance as part of the bond covenants. Without that certification no bonds can be sold, and without those bonds, there can be no use of emergency appropriations. To ensure that the budget is in balance, the prefatory language to the ATL bill allows the Budget Director to make cuts (in whole or in part) to virtually every appropriation. While the language lays out a process for making these reductions, it in essence allows for rolling cuts if deemed necessary in the sole discretion of the Budget Director.

The Trigger: This year's Aid to Localities budget included language that allowed for certain action to be taken in a measurement period if "on a cash basis of accounting, a General Fund imbalance" occurs. The budget shall be "deemed unbalanced for the fiscal year if, during any Measurement Period, Actual State Operating Funds Tax Receipts are less than ninety-nine percent of Estimated State Operating Funds Tax Receipts, or Actual State Operating Funds Disbursements are more than one-hundred and one (101) percent of Estimated State Operating Funds Disbursements, or both."

Measurement Periods: The Budget Director is to make assessments of possible imbalances on a regular, specified basis. A "Measurement Period" is defined as "the period in which the

[1] Operating budgets for the agencies and authorities are included in the State Operations appropriations bill, not the Aid to Localities bill.

difference between Actual State Operating Funds tax receipts and 'Estimated State Operating Funds tax receipts'" is measured.

- The first measurement period is April 1-30, 2020. "Financial Plan estimates for this period shall be the Executive Financial Plan as Updated for Governor's Amendments and Forecast Revisions issued in February 2020."
- The second measurement period is May 1-June 30, 2020.
- The third measurement is July 1-December 31, 2020.

The Financial Plans for the first measurement period will rely on certain estimates.

Who Can Act, and Scope of Authority: If such imbalance occurs, the law authorizes the Budget Director "to adjust or reduce any general fund and/or state special revenue fund appropriation contained [in the Aid to Localities appropriations] and related cash disbursement by any amount needed to maintain a balanced budget for the 2020-2021 fiscal year."

How Cuts or Adjustments Can Be Made: The language gives the Budget Director flexibility to make uniform across-the-board cuts, or by cutting/adjusting specific appropriations in a measurement period. Prior to any adjustments or reductions, the Budget Director must notify the Chairs of the Senate Finance Committee and Assembly Ways and Means Committee, and the legislature will have ten days to either prepare its own plan (adopted by concurrent resolution passed by both houses) or if the Legislature fails to adopt its own plan, the Budget Director's reductions will go into effect automatically.

Exemptions: The following types of appropriations are exempt:
- public assistance payments for families and individuals and payments for eligible aged, blind and disabled persons related to supplemental social security;
- any reductions that would violate federal law;
- payments of debt service and related expenses for which the state is constitutionally obligated to pay debt service or is contractually obligated to pay debt service, subject to an appropriation, including where the State has a contingent contractual obligation; and
- payments the state is obligated to make pursuant to court orders or judgments.

Restoration of Payments: The language also allows for reductions to be restored, provided:

- actual state operating funds tax receipts through February 28, 2021, are not less than ninety-eight percent of estimated State operating funds tax receipts through February 28, 2021; OR

- the federal government provides aid that the Budget Director deems sufficient to reduce or eliminate the imbalance in the General Fund for fiscal year 2020-2021 and does not adversely impact the budget gap in fiscal year 2021-2022.

Before any restorative payments could be made, the Budget Director would have to certify that the payments could be made without issuance of bonds or notes, without "extraordinary" cash management, and that the State's rainy day funds have been restored.

Overriding Super Power: All the above notwithstanding, the budget language gives the Budget Director the authority to "to withhold all or some of the [appropriated] amounts . . ., if, in his or her sole discretion, such action is necessary to respond to the direct and indirect economic, financial, and social effects of the COVID-19 pandemic." Five days prior to the beginning of the month, the Budget Director would have to give notice to the Legislature of payments expected to be withheld or reduced, and seven days after the end of the month, the Budget Director would have to give notice of payments actually reduced.

Authority to Adjust the Medicaid Budget

Since 2011, the Medicaid program has been capped at a certain spending level, and authority has been given to the State to make reductions to the program spending if it exceeds the cap. In determining whether to adjust projections, DOB will look at:

- Changes in FMAP
- Changes in provider revenues
- Reductions in local social services districts Medicaid administration
- Minimum wage increases
- The operational costs of the Medical Indemnity Fund; and
- The costs and savings from the Basic Health Plan.

Additionally, the State may adjust projections "to account for increased or expedited" Medicaid expenditures "as a result of a natural or other type of disaster, including a governmental declaration of emergency."

Notwithstanding any other law, reductions can be made by changing or stopping reimbursements (including fees, premiums and rates). Additionally, the State is authorized to "modify Medicaid program benefits."

This is the section of law that also requires DOH to report monthly on Medicaid expenditures and how or whether the State is under (or exceeds) the cap. The report is to include monthly expenditures, factors that relate to disbursements causing the Department to exceed (or fall below) projections, including those related enrollment fluctuations, rate changes, utilization changes, investments, movements of populations to managed care, and "variations in offline Medicaid payments." DOH must also report on any actions to implement savings and how they affect categories of services and geographies. Price and price changes to the following categories must also be specifically reported on: inpatient, outpatient, emergency room, nursing homes, other long term care, Medicaid managed care, Family Health Plus, pharmacy, transportation, dental, non-institutional and "all other" categories, affordable housing, vital access provider services, behavioral health vital access provider services, health home grants, grants to transition behavioral health to managed care, other transitions to managed care, the Finger Lakes Health Systems Agency, audit recoveries and settlements, among other things.

In this year's budget, the language was changed to provide a more streamlined approach to making reductions in Medicaid savings. Previously, DOH would have to develop a spending reduction plan that would have to be approved by the Budget Director. With the changes in this year's budget language, development of a plan is not required, and authority is given to DOH to make the needed adjustments.

Language was also added to require that adjustments "be applied equally across categories of service" unless the data demonstrates that spending spikes are driven by a particular category of service. DOH would be required to notify impacted providers via public notice 30 days prior to the implementation of any adjustment. The language further provides that such cuts may nevertheless be avoided if DOH subsequently comes up with a plan, approved by the Budget Director, to limit such cuts.

Other changes in the language include:

- Specification that any adjustments to Medicaid managed care plan rates and premiums must be consistent with actuarial soundness principles and requirements; and
- Allowing the State to seek State Plan Amendments to achieve reductions.

Please contact us with any questions.