



Center for Disability Rights, Inc.

Analysis of the 2015-2016 Executive Budget: Proposals that Impact People with Disabilities

January 28, 2015

OVERVIEW

The Center for Disability Rights (CDR) is a statewide disability-led, not-for-profit organization that advocates for the full integration, independence, and civil rights of people with disabilities. CDR

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provides services and supports to people with disabilities and seniors within the framework of an Independent Living Model. CDR works for national, state, and local systemic change to advance the rights of people with disabilities by supporting direct action, coalition building, community organizing, policy analysis, litigation, training for advocates, and community education.

Each year, CDR closely reviews and responds to the State of the State and the Executive's proposed budget. CDR's response focuses on the proposed Executive Budget's impact on people with disabilities

Center for Disability Rights – Analysis of 2015 Opportunity Agenda and, more specifically, how the budget affects the ability of people with disabilities to live independently in the community.

Last year's Budget contained only a few initiatives focused on improving the lives of people with disabilities, and did not leverage the millions of dollars potentially available to the State through Community First Choice (CFC) to incentivize community-based long term services and supports; rather, it continued to invest in the antiquated institutional medical model. During the year, Governor Cuomo did take some important steps to support people with disabilities living in the community, including introducing an amendment to the Nurse Practice Act to allow nurses to assign tasks to Advanced Home Health Aides. This amendment is an integral step toward implementing CFC and increasing independent living. Although the amendment was held up in the legislature, the Administration again supported us by creating a stakeholder workgroup in order to enact these amendments this year. In September, the Governor created an Employment First Commission to make integrated, competitive employment the first option for people with disabilities. In addition to this, in December, Governor Cuomo came through for people using Consumer-Directed Personal Attendant Services (CDPAS) when he allocated \$5 million as a partial solution, intended to ensure that those services would not be interrupted due to changes in the overtime rule.

Throughout the year, CDR and the Disability Community fought for the continued integration of all people with disabilities in New York. We participated in the stakeholder workgroup to amend the Nurse Practice Act. In addition, we participated in the creation of the ICAN "Ombuds" program, an agency intended to protect consumers currently receiving or seeking long term services and supports through Medicaid Managed Care, Managed Long Term

Center for Disability Rights – Analysis of 2015 Opportunity Agenda Care, or the Fully Integrated Dual Advantage program. Perhaps most importantly, we were successful in convincing Governor Cuomo to allocate funding for CDPAS consumers and attendants affected by the overtime rule during the 2014-15 fiscal year.

This year's budget, the 2015 Opportunity Agenda, reflects the Governor's ambitious social agenda for New York. It creates a number of programs and initiatives to address community living, health, housing, transportation, poverty, education, and civil rights. Only a few of these initiatives are specifically targeted at people with disabilities, and we will work to expand the scope of these programs to explicitly include our community. At the same time, those initiatives which do have a focus on people with disabilities lay the ground work for a great deal of improvement in integration and community living in the next few years; we applaud in particular the Governor's renewed commitment to Community First Choice and the Olmstead Plan, and his project to create the Office on Community Living.

CDR is concerned that the budget does not contain funding for a living wage for CDPAS attendants, even while the Governor is calling for the minimum wage to be raised across the State. Related to wages for attendants, this year's budget also does not contain funding to pay for attendant overtime in case the overtime rule is re-instated this year. Finally, CDR notes that the Independent Living Centers (ILCs) remain flat-funded for yet another year: ILCs have not had a funding increase in ten years, even though demand for the services we provide has gone up nearly 28% in that same time, and overhead costs have also increased during the same period.

CDR applauds the ambitious vision that the Governor has put forward for New York, and stands ready to work with his

Center for Disability Rights – Analysis of 2015 Opportunity Agenda administration to develop the policy and budget in a way that will include people with disabilities equally in this vision.

I. OLMSTEAD IMPLEMENTATION & LONG TERM SERVICES AND SUPPORTS

CDR applauds Governor Cuomo's commitment to Community First Choice and his policy of designating the increased funding from for implementation of the Governor's Olmstead Plan, but urges the Administration to speed implementation of CFC.

The Community First Choice (CFC) Option is an optional Medicaid funding mechanism that assures individuals who are eligible for institutional placement can receive services and supports in home and community based settings. States that select CFC are eligible to receive an increased federal match of six percent. In 2011, Governor Cuomo announced that New York would be selecting CFC although implementation was delayed because the State would have been unable to meet the maintenance of effort requirement. In 2013, Governor Cuomo reaffirmed his commitment to CFC, and in December of that year, the Administration submitted the proposed State Plan Amendment to the Centers for Medicare and Medicaid Services.

CDR estimates that implementation of CFC will initially generate \$299 million in net revenue. As the State implements the Governor's Olmstead plan and transitions people from nursing facilities and other institutions into the community, that increases to \$439 million annually.¹ It has been more than a year since New

¹ Fiscal Analysis of CFC and the New York State Medicaid Budget. (2014, November 18). Retrieved January 27, 2015, from <http://ilny.org/programs/cfc-tap/fiscal-analysis>.

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York submitted its proposed State Plan Amendment to CMS. Further delay – which prevents the State from leveraging these additional funds – is unacceptable.

The Governor’s budget designates the additional CFC funding for investment in initiatives that operationalize his Olmstead Plan. CDR applauds the Governor’s proposal, however we recognize that the funds – even with this restriction – could be used in a variety of ways. To ensure that people with disabilities and Olmstead advocates are able to play a role in this decision-making process, CDR urges that the allocation plan for utilizing the CFC funding be approved by the Disability Community. CDR also believes that there are specific initiatives and programs which must have their funding increased, and CFC is a natural source of funding. In particular, CFC funding should be used to ensure that attendants providing Consumer Directed Personal Attendant Services (CDPAS) receive a living wage and that funding is available to cover the cost of overtime and travel time under the Fair Labor Standards Act (FLSA). Additionally, CFC funding should be used to increase the State base funding level to \$545,000 for each of the 41 Independent Living Centers in New York State.²

CDR supports amending the Nurse Practice Act to support broad implementation of CFC and urges the legislature and State Education Department to follow the Governor’s lead.

To secure the federal funds available to New York through CFC, attendants in the community must be able to perform health related tasks like administration of medication and assistance with feeding tubes or ventilators. The budget includes legislation

² Invest in Community Living. (2014, December 5). Retrieved January 27, 2015, from <http://ilny.org/downloads/category/31-cfc?download=331:investing-in-community-living>.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda amending the Nurse Practice Act to allow nurses to assign certain health related tasks to “Advanced Home Health Aides (AHHAs).”³ These are tasks that, until now, only a nurse could perform. When legislation accomplishing this failed to pass last year, the Governor convened a workgroup of stakeholders to identify the tasks that could be assigned to attendants as well as make recommendations for training and supervision requirements. CDR participated in this process.

As it is presently written, the amendment to the Nurse Practice Act will require people to work as Certified Home Health Aides for at least a year prior to becoming AHHAs. The stakeholder group felt this requirement would unnecessarily prevent attendants who are certified as Home Health Aides but working as Personal Care Attendants, from becoming AHHAs. This requirement was rejected by the AHHA Stakeholder Committee, and should be removed from the final legislation. With this minor change, CDR calls for the passage of this important legislation.

We urge the State Education Department and the Department of Health to work together to create the training program contemplated in the amendments and develop the necessary regulations in a timely manner. This is a vital and important step to secure the right of individuals with disabilities to receive services and supports in the community.

CDR applauds the creation of a new Office on Community Living, and the commitment of the State to consult with stakeholders in the creation of that office.

The budget calls for the Director of the State Office For Aging to gather information from stakeholders for the creation of a new

³ Health and Mental Hygiene (HMH) Budget, p. 117.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda Office on Community Living “with the goal of providing improvements in service delivery and improved program outcomes that would result from the expansion of community living integration services for older adults and persons of all ages with disabilities.”⁴ This information gathering process is to focus on furthering the goals of the Governor’s Olmstead Plan, strengthening the No Wrong Door approach to delivering information and services, and improving delivery of services, among other areas. The purpose of this information gathering is to create, by December 15, 2015, a report and recommendations for the creation of an Office on Community Living.

CDR strongly endorses the Governor’s ground-breaking proposal. There is great potential in New York for such an Office to coordinate resources, policies, and initiatives that are currently spread among multiple agencies; to marshal resources in support of independent living; and to maximize the State’s share of CFC funding. CDR believes that the creation of this Office can be a powerful force for the advancement of the shared goals of people with disabilities and seniors to remain in our homes and our communities, and to receive needed supports and services without being forced into institutions.

Consumer Directed Personal Assistance Services must not be interrupted because of changes in federal labor law.

Despite the efforts of disability rights advocates to delay changes to the Fair Labor Standards Act Companionship Exemption, the US Department of Labor (US DOL) planned to implement a rule on January 1, 2015 that would have required the payment to attendants of travel time and time-and-a-half of base wages for

⁴ HMM Budget, p. 140.

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hours worked over 40 per week. This rule did not come with additional federal funding to ensure that attendants would actually be paid more for their overtime hours. Without funding to pay the additional wages and benefits, fiscal intermediaries planned to cap attendant hours at 40. This left consumers at risk of institutionalization unless they could find additional attendants to work the hours above the cap, and disrupted the lives of consumers who were lucky enough to find someone to do that work. Governor Cuomo used Balancing Incentives Payment funds as a temporary fix to pay for some of the new overtime obligation.

The Governor's temporary funding was not needed because at the last minute, two court orders – issued on December 31, 2014 and January 14, 2015 – prevented the rule from coming into effect. Both court orders have been appealed by the US DOL, and it is possible the rule will be put back into effect as soon as six months from now. There is no mechanism, and no ongoing funding, to pay for the additional overtime costs if the appeal is successful. It is estimated that overtime for CDPAS attendants in New York State alone would have cost more than \$20 million in 2013. The State must commit to ensuring that these vital services are not interrupted by changes to the labor law, and that commitment must take the form of an allocation of funding which can be used to pay attendants for overtime if the labor regulation requiring that payment is upheld in the courts.

The State must establish and fund a living wage for consumer directed personal attendants.

The budget calls for New York to raise the minimum wage to \$10.50 statewide, and \$11.50 in New York City in 2016.⁵ The creation of a living wage is a laudable goal, and raising the

⁵ Education, Labor, and Family Assistance (ELFA) Budget, p. 310.

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minimum wage is a good step in this direction, but – even in this budget – the State has not provided the funds needed to do this.

The State has established and funded a living wage for some attendants working in traditional home care. Unfortunately, other attendants – including those who work in the consumer directed model – have had their wages held flat for years because of cuts in Medicaid rates and implementation of managed care. Some managed care organizations have pointed to the fact that there are no living wage requirements as a reason that they are free to cut the rates for this program.

The Consumer Directed Personal Assistance Association of New York State has recommended that legislation be passed requiring managed care organizations and Medicaid to reimburse fiscal intermediaries an amount sufficient to pay attendants at a living wage, at 150 percent of the minimum wage, while still meeting all of their other financial obligations. Without adequate wages, individuals with disabilities will be unable to attract and retain workers, and in some cases will be forced into institutions, which are more costly than home and community settings, but which are guaranteed to be funded. For the sake of the State's own sound fiscal health, as well as the rights of people to live in home and community settings, the 2016 budget must establish and fund a living wage for CDPAS attendants.

NY Connects must meaningfully engage with the disability community in order to create a true "No Wrong Door" service model.

The Budget includes funding for the State's No Wrong Door service model, NY Connects. CDR has worked on creating this service model for a long time and applauds the Governor's

Center for Disability Rights – Analysis of 2015 Opportunity Agenda commitment to its ongoing health. NY Connects is a program with a great deal of potential for the goals of the Office on Community Living, and CDR is pleased to see it receive additional funding.

There is room for improvement, however, in terms of NY Connects meaningfully engaging with the disability community in order to ensure that it is a true “no wrong door” service model for people with disabilities as well as the aging community. The Governor’s briefing book calls for an allocation of \$8.2 million for the 2015-2016 budget year, and an increase to \$18.1 million for the following year. With the allocation of these funds, the State Office for the Aging must mandate that local projects involve the Independent Living Centers. In doing so, NY Connects should be able to take great strides toward including people with disabilities in this important program.

CDR urges the Cuomo administration to increase funding for Independent Living Centers.

In order to realize the goals of the Olmstead Plan and the promise of independent living, the State must invest in the State’s network of Independent Living Centers (ILCs). ILCs are at the forefront of ensuring that people with disabilities have the assistance we need to live integrated, independent lives in our communities. The core ILC services of skills training; individual advocacy; peer counseling; information and referral; and transition and diversion are absolutely necessary to ensure that we have the right to live independently and in our own homes and communities rather than institutions. In addition, each ILC provides additional services that address the particular challenges and needs of the community or region where it is located.

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The State has left ILC funding at the same level for the past decade, despite the fact that demand for ILC services has increased nearly 28% over that same period. In addition, the costs of operating a center, employing staff, purchasing insurance, and providing services have increased as well. Many ILCs have had to lay off essential staff in order to make ends meet and, without additional funding, will not be able to ensure that people receive the services they need to live in the community.

In addition to the millions of dollars which ILCs can help the State to receive through CFC, ILCs also save the State a great deal of money that would otherwise be spent on costly institutional placements. Data from ACCES-VR indicates that the work of ILCs has saved the State more than \$1.4 billion since 2001, as ILCs have helped people who would otherwise be forced into institutions to remain in their homes and their communities. In light of the value that ILCs deliver, and the funding available through CFC, the State should invest in the health of all ILCs by raising the base funding level to \$545,000 for each center.

II. ACCESS TO HEALTH CARE FOR ALL NEW YORKERS

The State must not eliminate the Prescriber Prevails provisions of Medicaid prescription drug coverage.

CDR opposes the Governor's proposal to eliminate the "prescriber prevails" provisions in the fee-for-service and managed care programs.⁶ Although A-rated generic equivalents are considered to be therapeutically equivalent by the FDA, using generic instead of brand-name medication can have negative consequences for some disabled individuals. Evidence suggests that variations in bioavailability and clinical effectiveness between different drug

⁶ HMH Budget, p.13

Center for Disability Rights – Analysis of 2015 Opportunity Agenda formulations may in fact be significant. Cases have been documented where switching a disabled individual from a brand name medication to its generic equivalent resulted in negative outcomes. One report has documented the case of a 14-year-old boy with bipolar affective disorder, autism and an intellectual disability who had been switched from a brand-name to generic medication. The change resulted in a rapid deterioration of his mental state which was not related to any physical illness or other medication adjustment. It resolved as rapidly when the generic medication was switched back to the brand-name. Such complications may happen with a variety of patients but are far more likely for individuals with disabilities.

In addition, some individuals with sensory, intellectual or other cognitive disabilities may rely on the unique size, shape and color of a medication to distinguish it from other medications they take. It is imperative that individuals with disabilities and other chronic healthcare conditions continue to have access to the brand name medication. CDR opposes eliminating the “prescriber prevails” provisions.

The spousal refusal provisions of Medicaid must not be narrowed.

The budget calls for a change to spousal refusal for receiving supports and services.⁷ CDR opposes this change, because it will narrow the possibility of spousal refusal by requiring a spouse to both refuse to support the disabled spouse *and* to be absent from the disabled spouse’s household. The current law requires either the spouse to refuse *or* the spouse to be absent.

⁷ HMH Budget, p. 44.

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Federal law allows a Medicaid applicant to choose to use spousal refusal budgeting when it is more advantageous to the applicant.⁸ In its current form, the law on spousal refusal has allowed a disabled spouse to receive services and supports without the other spouse first having to reduce his or her resources to the point that the household would qualify for Medicaid. This has meant that a couple has not been forced to get a divorce just so that one of them could receive benefits. It has also meant that a disabled person could get married without losing their services and supports.

The current law should not be changed, because, as a matter of basic human rights, the State should not provide supports and services in a way that separates families or prevents people from getting married. People should not be forced to decide between their families and the services they need to survive.

The State must not remove the emergency medical needs funding requirement.

The budget changes the law to no longer require the local department of social service from funding emergency medical needs for individuals in immediate need of personal care services, including consumer directed attendant services, outside of their period of presumptive eligibility for Medicaid services.⁹ This change in the law is in response to a court decision last year that

⁸ Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act, GIS 14/MA 25, November 3, 2014, retrieved January 28, 2015 from http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/14ma025.pdf

⁹ HMM Budget, pp. 45-46.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda found that the statute as written did require such funding from the local department of social service.

CDR opposes this change, because a person in immediate need of personal care services is, by law, always able to get those services at an institution. It is CDR's position that services should be made available to a person in the most integrated setting by default.

III. ACCESS TO HOUSING & TRANSPORTATION

Housing created under the Governor's plan must be accessible.

In 2013, Governor Cuomo launched the House NY program to create and preserve housing units throughout the State.¹⁰ The Governor stated that this program will create thousands of dwellings for low-income New Yorkers. Furthermore, Cuomo plans to invest \$229 million in capital resources in House NY in the 2015-16 budget.¹¹ Currently, only a small percentage of housing units will be required to be accessible to people with disabilities, even though people with disabilities represent a large percentage of the people who would qualify for this housing.

For people with physical disabilities, living in the community is simply not an option without affordable, accessible, integrated housing. Additionally, accessible housing is needed to support the transition of individuals from institutional settings to the community. To ensure that this housing is available, CDR urges the administration require **all** housing created under the Governor's initiatives to meet the accessibility requirements listed in the Fair Housing Amendments Act (FHAA), including: (1) an

¹⁰ 2015 State of the State, p. 168.

¹¹ 2015 State of the State, p. 168.

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accessible entrance on an accessible route; (2) accessible public and common use areas; (3) usable doors; (4) accessible route into and throughout the dwelling unit; (5) accessible light switches, electrical outlets, thermostats, and environmental controls; (6) reinforced walls in bathrooms for grab bars; and (7) usable kitchens and bathrooms. While the FHAA only requires buildings that have four or more units to meet these requirements, **all** housing units created under the Governor's initiatives should meet these requirements, regardless of the type or amount of housing units.

New Yorkers with disabilities should have access to all of the types of housing that the Governor is making available to all other New Yorkers. If the Governor's initiatives include the creation of affordable single family dwellings, those dwellings should meet these minimum accessibility requirements. Furthermore, at least four percent of all dwelling units created should be accessible to New Yorkers with sensory disabilities.

CDR commends Governor Cuomo's Property Tax Relief Program.

Governor Cuomo has demonstrated his commitment to ensuring that New Yorkers can afford their own homes by working to make property taxes less of a burden to homeowners. The Property Tax Relief Program in this year's Executive Budget will help homeowners with disabilities. This program provides a tax credit to households with incomes below \$250,000 whose property tax exceeds six percent of their income.¹² Individuals with disabilities often have low incomes, so those individuals with disabilities who are homeowners will be able to benefit from this tax credit. Additionally, elderly individuals find themselves at risk of

¹² 2015 State of the State, page 22.

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CDR urges full restoration of funding for the Access to Home Program and maintaining broad eligibility for the program.

The Access to Home program has been flat-funded at \$1 million for yet another year.¹³ This vital program provides home modifications for New York’s people with disabilities and seniors who need home modifications in order to remain independent in their homes. The Access to Home program was originally funded at \$5 million and was not able, even at that level of funding, to meet the needs of eligible New Yorkers. With the implementation of CFC and the Governor’s Olmstead Plan, the State should be preparing for many more individuals to be living in homes that require modifications to become accessible, and should, at a minimum, restore funding for Access to Home to the original \$5 million.

The budget also called for up to \$19.6 million to be allocated to Access to Home for the purpose of providing assistance to disabled veterans.¹⁴ Access to Home is meant to help all people with disabilities and seniors, not just veterans, and the inclusion of \$19 million in funding for Access to Home limited to veterans suggests that there is room in the budget to fund Access to Home for all New Yorkers at or above its original funding level while still providing generously for disabled veterans. Rather than provide nearly 20 times more funding to assist only a small number of

¹³ Capital Projects Budget, p. 287.

¹⁴ Aid to Localities Budget, p. 564

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people with disabilities, CDR calls for the State to adequately fund
Access to Home for all people with disabilities, including veterans.

CDR urges the Cuomo Administration to delink housing from services and supports.

The State of the State boasts that the Medicaid Redesign Team has invested \$388 million in “supportive housing,” which is housing coupled with individual-based services and provides housing to more than 8,000 Medicaid enrollees.¹⁵ Unfortunately, failing to provide housing independent of supports and services is inconsistent with the “home and community based setting” rules and with the requirements of CFC.

There are three main characteristics that a setting must embody in order to be considered integrated and community-based: (1) People with disabilities should not be required to accept or comply with services to get and/or maintain housing; (2) People with disabilities should be able to maintain their legal tenant and housing rights and still receive the services and supports they need; and (3) People with disabilities should be able to direct fundamental decisions that affect their lives and get the services and supports they need.

Funding which is allocated to creating supportive housing is not eligible for the CFC match if the consumer was not offered a meaningful choice to receive services in a residence that is not provider-controlled. At this point, provider-controlled residential options overwhelm the accessible housing options for a consumer to live in community: without more options for a consumer to receive services in their own residence, it is difficult to say that the consumer was offered a meaningful choice.

¹⁵ 2015 State of the State, p. 298.

CDR urges the Cuomo administration to fund affordable, accessible and integrated housing options where a Medicaid recipient's housing is not conditioned upon whether or not they accept services to assure that individuals are provided a real opportunity to live independently in the community – including in a residential unit as required by the setting rules.

CDR commends the Olmstead Mobility Management Pilot Program

CDR applauds the creation of the Olmstead Mobility Management Project.¹⁶ This project will assess the mobility and transportation needs of people with disabilities, identify barriers to community integration, and coordinate medical and non-medical transportation services in a pilot project to increase community integration through transportation services. Transportation is a major challenge to independent living throughout New York. Whether they are in New York City, where inaccessible train stations that make many areas inaccessible to individuals with mobility disabilities, or in rural New York, where disabled people cannot access their most basic needs because of a lack of public transportation options, improved access to transportation is necessary for seniors and people with disabilities to live in the community.

The Governor's Olmstead Plan calls for the Department of Health to transition 10% of the long term nursing facility population out of facilities and into the community over five years, approximately 1,800 people per year. As this transition takes place, accessible transportation systems must expand to meet the increased demand for transportation.

¹⁶ HMM Budget, p. 45

We applaud the beginning of a process for regional planning to provide transportation options for disabled people living in the community, and urge the Department to consult with actual people with disabilities to ensure the success of this project. The clock is already ticking for the Department to transition people out of nursing facilities, and planning to meet the transportation needs of people with disabilities must be a top priority.

Medicaid transportation management must incorporate stakeholder involvement.

The Governor's budget allows the Department of Health, rather than local social service agencies, to manage Medicaid Transportation Services.¹⁷ This change in management has potential to help people with disabilities by locating the management, contracting, and reimbursement, of these services under the oversight of the Department of Health, where the State can standardize a high level of service. If implemented correctly, this can broaden the scope of places where people can live as they transition out of institutions and nursing facilities. Consistent transportation to medical services is a key factor for the success of people transitioning into the community, and at present there is a wide variety in the level of service that people receive, depending on where in the state they happen to live.

However, CDR is concerned about the blanket authority that the Commissioner of Health will have to determine what local entities will be the providers of Medicaid Transportation services. In planning and managing these vital services, the Commissioner must obtain and incorporate input from community stakeholders,

¹⁷ HMH Budget, p. 86.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda including people with disabilities, in order to ensure that this service operates at its full potential.

Investments in New York City transportation must include accessibility improvements.

The Executive Budget includes a number of investments to improve transportation in New York City, including extending an “Air-Train” to LaGuardia Airport,¹⁸ creating new metro stations in the Bronx, and extending access to Penn Station.¹⁹ Both disabled visitors and disabled residents of New York City rely on public transportation and will benefit from improvements to the transportation systems, so long as accessibility is included in the improvements.

Many travelers with disabilities choose to travel to JFK Airport, even when flights to LaGuardia are cheaper or have better travel times, because public transportation to and from JFK is more accessible. Extending an “Air-Train” to LaGuardia that is fully accessible will provide more travel options for people with disabilities. Additionally, transportation options for people with disabilities in the Bronx are limited due to minimal accessible metro stations. Creating four metro stations in the Bronx that are fully accessible will greatly improve transportation options and community living options for disabled people in New York City.

CDR supports the Administration’s plan to improve transportation in New York City and urges the Administration to include people with disabilities in the planning processes for these improvements to ensure full accessibility.

¹⁸ 2015 State of the State, p. 48.

¹⁹ 2015 State of the State, p. 49.

IV. ESCAPING POVERTY THROUGH PLANNING, PROTECTION, EDUCATION, & EMPLOYMENT

CDR applauds Governor Cuomo for recognizing people with disabilities in the Rochester anti-poverty initiative.

CDR is pleased that Governor Cuomo recognizes the need to include people with disabilities in the new Rochester Anti-Poverty Strike Force²⁰ and that the needs of Rochester’s Disability Community were specifically mentioned in the context of this anti-poverty initiative, because disability is often an unmentioned component of poverty, and often neglected in efforts to address it. The Strike Force will work to integrate services, coordinate resources, and gather data to address the causes of persistent poverty in our region. This work has great potential to help people with disabilities who live in poverty to overcome barriers to employment, find stable and independent housing, and to receive services that truly address their needs. CDR is eager to join with the other stakeholders, community groups, and government agencies on the Rochester Anti-Poverty Task Force, and to work together to remove the barriers in our community between prosperity and our people.

CDR supports the pass-through of the federal COLA for Supplemental Security Income.

The Executive Budget authorizes the pass-through of the Federal Supplemental Security Income (SSI) Cost of Living Adjustment, which becomes effective on or after January 1, 2016. This is a necessary action because without this mechanism in statute, there will be no means for the State to draw down the additional federal funds. People who receive SSI will see a modest increase in their

²⁰ State of the State, p. 156.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda checks.

The New York must support the success of students with disabilities.

CDR is pleased that Governor Cuomo has called for charter schools to enroll Students with Disabilities and to report those enrollment rates to the State Education Department (SED).²¹ The State is best served when its educational choices are available to all New Yorkers and their children, and students with disabilities have the right to enjoy the same options that all students enjoy.

Including students with disabilities in the broad spectrum of school choices available in New York will help to address the effect of lowered expectations for disabled students. Making sure that students with disabilities have access to the same choices as all students will improve our educational success, and is the right thing to do.

The State must also support the success of students with disabilities through mentorship. The Governor has called for the State to re-establish the New York Youth Mentoring Program, to be chaired by his mother, Mrs. Matilda Cuomo.²² This program is focused on connecting foster children, children in high-need communities, and other children in need to a network of mentors who can help them succeed in school and to graduate.

CDR applauds the creation of this program and the effect it is likely to have on the youth of New York. Many children in high-need communities, and many children in need, are children with

²¹ Education Reform Budget, p. 79.

²² 2015 State of the State, p. 252.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda disabilities, and the program can be a powerful force for good in helping children with disabilities to succeed in school and in life. For this reason, CDR asks that the New York Youth Mentoring Program include a particular focus on youth with disabilities. The presence of a mentor whose training includes a disability focus can mean the difference between graduating, and dropping out; between getting in to college and not even applying.

Lastly, CDR is concerned about the effect that testing assessments will have on students with disabilities. The Governor has introduced an ambitious agenda for education reform this year. Included in his agenda are several changes to the use of standardized testing.²³ The Governor has proposed to limit the amount of time allowed for standardized testing and standardized test preparation for third- through eighth-graders, and to eliminate standardized testing in kindergarten through third grade. These proposals may have serious effects on the education of youth with disabilities.

The use of standardized testing can place children with disabilities at a disadvantage in the classroom and in their educational assessment. For many children, performance on standardized tests does not adequately reflect their educational progress. In addition, the emphasis on standardized testing as a means to assess teacher performance can create a perverse incentive for good teachers to avoid teaching students who are likely to under-perform on standardized tests, including students with disabilities. The State must take care to ensure that standardized testing or assessment is not tied to teacher compensation or promotion in any way that will leave students with disabilities behind.

²³ 2015 State of the State, p. 222.

CDR applauds the creation of the Employment First Commission.

In September, 2014, the Governor created an Employment First Commission, charged with crafting policy to ensure that integrated, competitive employment is the first option for people with disabilities. This commission is also intended to identify and register businesses that have a formal policy of hiring disabled workers. CDR applauds attention being brought to the persistent problems of unemployment and underemployment among people with disabilities.

CDR urges the State to end subminimum wages for workers with disabilities.

Governor Cuomo's ambitious social agenda has initiatives that promise to make wages fair, create sustainable jobs, and to protect the rights of workers. The budget has called for New York State to raise the minimum wage to \$10.50 per hour, statewide, and \$11.50 per hour in New York City because, as the Governor has said, "a reasonable minimum wage is the only way to improve the standard of living for workers, reduce poverty, encourage fair and more efficient business practices, and ensure that the most vulnerable members of the workforce can contribute to the economy."²⁴

The Governor has also called for the creation of a reform package to protect New York's most vulnerable workers from abusive tactics by employers.²⁵ The first item that the Governor brings up, in connection with this reform package, is a study showing that one-third of job seekers at certain agencies were offered jobs at

²⁴ 2015 State of the State, p. 158.

²⁵ 2015 State of the State, p. 185.

less than the existing minimum wage of \$7.25 per hour. The Governor is correct that payment of less than the minimum wage is an abusive tactic that employers use to enrich themselves at the expense of workers, and he is correct to call for an end to this form of abuse. Notably absent from these initiatives, however, is the elimination of the law that allows employers to pay people with disabilities a wage below the minimum wage.

Section 14(c) of the Federal Fair Labor Standards Act contains an exemption that allows employers to pay people with disabilities a wage that is less than the Federal minimum wage. Organizations that employ people with disabilities, including non-profit organizations that claim it is their mission to empower disabled people, take advantage of this exemption; some may pay people with disabilities as little as \$0.22 per hour. Not only do these organizations pay workers less than the minimum wage, they are also subsidized by tax credits.²⁶ This shameful practice must end.

As New York State raises the minimum wage for all New Yorkers, it must include all New Yorkers with Disabilities. The State must repeal the laws that allow sheltered workshops to operate in New York, and that make them eligible for tax credits for employing people with disabilities. If the State will not outlaw the use of subminimum wage, it should at a very minimum refuse to contract with organizations that avail themselves of the 14(c) certificates.

CDR urges the State to include disability-owned businesses in the definition of Minority and Women-owned Business Enterprises, for the purpose of state contracting.

The Governor has called for the State Contracting process to increase opportunities for Minority and Women-owned Business

²⁶ NY LAB §25-b(b)(2)(ii).

Center for Disability Rights – Analysis of 2015 Opportunity Agenda Enterprises (MWBEs) up to 30% of total state utilization.²⁷ The current utilization exceeded 25% during the 2013-14 fiscal year, the highest in the program’s history, and up from 10% when Governor Cuomo took office. The success of this program, which assists MWBEs to participate equally in state contracting, is tremendous.

CDR calls for the State to include business enterprises owned by people with disabilities in the definition of MWBEs, for the purpose of state contracting. The purpose of the MWBE program is to improve the economic prospects and entrepreneurship opportunities of people who have historically been excluded from these things. It is well documented that people with disabilities experience poverty at much higher rates than non-disabled people, and that we are the targets of discrimination. Including people with disabilities in the MWBE program will create incentives for us to start our own businesses and participate more fully in the economic life of the State.

If the State will not include businesses owned by disabled people in the MWBE definition, CDR calls for the State to include us in the feasibility study that the Department of Economic Development is conducting to study the economic disparity effects of the MWBE program.²⁸ The effects of including people with disabilities in the MWBE program have never, to our knowledge, been studied. New York has an opportunity to again be a leader in improving the lives of its disabled citizens by looking at the feasibility of including us in this program.

Tax credits for job creation should include incentives for hiring disabled employees.

²⁷ State of the State, p. 170.

²⁸ TED Budget, p. 170.

The Budget calls for the creation or expansion of a number of tax credits for companies to create jobs in New York State. Specifically, the Excelsior Tax Credit is expanded to include entertainment companies which create or retain jobs in New York, including the Excelsior Jobs Credit²⁹; the Urban Youth Jobs Program replaces and expands upon the Youth Works Tax Credit, with a budget of \$20 million, twice the budget of its predecessor;³⁰ and the Employee Training Incentive Program is created in this budget, with a to encourage employers to invest in creating a trained and talented workforce, to a maximum of \$5 million per year.³¹

With the creation of these programs, the State has an opportunity to address the real and persistent problem of unemployment among people with disabilities. Each of these programs should be amended to include a focus on hiring and training disabled people to work in accessible, integrated jobs at competitive wages.

V. CIVIL RIGHTS OF PEOPLE WITH DISABILITIES

CDR supports Governor Cuomo's plan to improve the New York voting system.

Recognizing that New York's voter participation is among the lowest in the nation, Governor Cuomo announced his plan to improve the New York voting system by simplifying ballots and expanding voter registration periods.³² Individuals with disabilities vote at a lower rate than those without disabilities. For example,

²⁹ Revenue Budget, p. 69.

³⁰ Revenue Budget, p. 80.

³¹ Revenue Budget, p. 91.

³² State of the State, pp. 272-73.

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in the 2012 election, the rate for people with disabilities who voted in New York State was 9.5% lower than non-disabled voters.³³

The Governor's plan to simplify the ballot design will be extremely helpful for individuals with intellectual disabilities. Voting can be confusing for even the most educated citizens because of the unclear language and the puzzling design of the ballots. This confusing system serves as a barrier to individuals with intellectual disabilities who want to understand and confidently cast their vote. CDR supports the simplifying the ballot design and encourages the Administration to include individuals with intellectual disabilities in the redesign process to ensure the new ballot design is as accessible as possible for all New Yorkers.

While the State of the State mentions that New York is one of the only states that does not allow for early voting, it did not include a plan to change this. CDR encourages the Cuomo Administration to create a plan for allowing early voting in New York. Early voting would make the voting process more accessible for seniors and disabled people, especially those with episodic disabilities who may not be able to go to the polls on voting day because of a flare up of symptoms and those with physical disabilities who are unable to endure extreme weather and may be able to avoid extreme weather conditions by having multiple days to choose from to vote.

Lastly, CDR urges the Cuomo Administration to refuse to sign any bill that would allow for inaccessible lever voting machines to be used in any election in New York. Every year a bill is introduced to

³³ Schur, L., Adya, M., & Kruse, D. (2013, July 18). Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections. Research Alliance for Accessible Voting.

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allow for “just one more year” of using outdated lever machines that New Yorkers with disabilities cannot use. Every New Yorker’s vote counts and no New Yorker should ever be prevented from voting because of the State’s choice to use inaccessible voting machines.

In selecting a relative guardian, New York must not define incapacity in terms of disability.

The Executive Budget creates a definition for a “Successor Guardian” when a relative guardian can no longer care for a child due to death or incapacity.³⁴ The Executive Budget further defines “incapacity” as “a substantial inability to care for a child as a result of: (a) a physically debilitating illness, disease or injury; or (b) a mental impairment that results in a substantial inability to understand the nature and consequences of decisions concerning the care of a child.”³⁵

This definition of incapacity is at once over-inclusive because is it focused solely on a person’s disability and under-inclusive because it is not focused on a person’s behavior. Throughout history in the United States, an individual’s disability has been used against them to terminate their rights to care for a child.³⁶ This definition of incapacity, with its emphasis on disability rather than behavior, furthers existing stereotypes about the ability of disabled individuals to care for children. Deeming an individual unable to care for a child because of “incapacity” which is based solely on

³⁴ ELFA Budget, p. 285.

³⁵ ELFA Budget, p. 285.

³⁶ Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children. (2012, September 27). Retrieved January 27, 2015, from <http://www.ncd.gov/publications/2012/Sep272012/>

the guardian's disability clearly violates the Americans with Disabilities Act as well as the fundamental human rights of the relative and the child.

This definition must be changed to focus on *behavior* that would make a guardian substantially unable to care for a child, instead of relying on disability as determining inability to care for a child.

The justice system must not give up on juveniles simply because they have a disability.

New York's current system treats juveniles with disabilities differently than juveniles without disabilities. Currently, OCFS can "return" any youth that they determine to be "mentally or physically incapable of being materially benefitted" by the OCFS programs to the county where the placement was made.³⁷ This means that the State will work hard for the well-being of juveniles without disabilities, but give up on disabled youth and return them to the county. In addition to this, the State is studying the disparate impact of detention outcomes for youth based on race, sex, national origin, and economic status, but has excluded disability from this study.

A disproportionate number of youth in the juvenile justice system have a disability.³⁸ Despite this, New York is ignoring disability as a risk factor for entry or contact with the juvenile justice system by excluding youth with disabilities from disparate impact studies, and by denying assistance to youth with disabilities when OCFS returns them to the counties.

³⁷ ELFA Budget, p. 193.

³⁸ Youths with Disabilities in the Juvenile Justice System. (2007, September). Retrieved January 27, 2015, from http://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_JDAI_handout_prevalence_92607.pdf

CDR urges the Cuomo Administration to recognize that youth with disabilities are a large part of our juvenile justice system, and to study this issue, assist youth with disabilities to succeed, and prevent this systemic neglect and discrimination from continuing.

The Administration must set guidelines for police interaction with people with disabilities, and provide data on police interactions with people with disabilities.

Governor Cuomo's seven point Justice Agenda includes providing race and ethnic data on police interactions statewide. There are countless instances across the State of interactions between people with disabilities and police that have ended in tragedy. Deaf individuals who were unable to hear police commands have been injured and even killed by police. Autistic people have also been hurt when they were unable to respond to directions as quickly as police demanded. People with intellectual disabilities have also suffered at the hands of the police due to the rigidity of police procedures.

It is because of instances such as these that CDR calls on specific guidelines for police interaction with people with disabilities to be incorporated into the Statewide "use of force" policy. CDR also calls for the State to provide data on police interactions with people with disabilities.

VI. LIFE IN THE COMMUNITY FOR SENIORS AND PEOPLE WITH DISABILITIES

Emergency preparedness trainings and plans must include plans for people with disabilities living in the community.

Governor Cuomo addressed the need for emergency preparedness in his oral and written state of the State,³⁹ as well as the Executive Budget. The State of the State addresses training leaders in emergency preparedness and preparing citizens to respond to disasters. Emergency preparedness as it relates to people with disabilities was not included in the State of the State. Although the Executive Budget provides for a disaster preparedness demonstration program for nursing facilities, there is no funding for a similar program to protect people with disabilities living in the community.⁴⁰

People with disabilities living in the community are especially vulnerable in times of disasters and other emergencies. During Superstorm Sandy, New York City was wholly unprepared to evacuate, protect, and otherwise meet the needs of citizens with disabilities. In fact, a federal court found that New York City violated the Americans with Disabilities Act by not giving people with disabilities access to emergency services. The rest of the State of New York is similarly unprepared to provide emergency services to people with disabilities.

CDR urges the Administration to specifically address the serious needs of people with disabilities in all emergency preparedness trainings and plans. To ensure that our needs are met, people with disabilities must be involved in the process of preparing the

³⁹ 2015 State of the State, pp. 258, 264.

⁴⁰ HMM Budget, p. 47.

Center for Disability Rights – Analysis of 2015 Opportunity Agenda plans and trainings. CDR also urges the Cuomo Administration to include a disaster preparedness demonstration program for people with disabilities living in the community in the budget, instead of limiting emergency preparedness for seniors and disabled people solely to those in nursing facilities.

Rebuilding the New York State Fairgrounds gives opportunity to build in access.

The Great New York State Fair brings together New Yorkers and visitors of all different backgrounds for 12 days. The Fair showcases agriculture, entertainment, education, and technology. Unfortunately, the Fair is not fully accessible to all of its guests. People with disabilities encounter many barriers at the New York State Fairgrounds, including inaccessible paths, doorways, and restrooms. The Cuomo Administration plans to rebuild the New York State Fair Grounds to make it a “premier multi-use facility.”⁴¹ CDR urges the Cuomo Administration to use this opportunity to make the Fair Grounds fully accessible so that no New Yorker is excluded from sharing in all that our great State Fair has to offer.

CDR supports Cuomo’s broadband initiative.

Many people with disabilities and seniors do not have access to internet services, resulting in a growing disability digital divide. Closing this divide is an important issue affecting people with disabilities because internet service is a necessity to accessing equal opportunities. Governor Cuomo’s New NY Broadband Program’s goal is to provide every New Yorker high speed internet access by 2018. ⁴² By providing every New Yorker with high speed internet, the Cuomo Administration will help to close this disability

⁴¹ 2015 State of the State, p. 63.

⁴² 2015 State of the State, p. 40.

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digital divide that has been preventing seniors and people with disabilities from having equal access to information, services, and opportunities.

ABOUT THE CENTER FOR DISABILITY RIGHTS

The Center for Disability Rights (CDR) is a disability led, not-for-profit organization headquartered in Rochester, New York, with satellite offices in Geneva, Corning, and Albany. CDR advocates for the full integration, independence, and civil rights of people with disabilities. CDR provides services to people with disabilities and seniors within the framework of an Independent Living Model, which promotes independence of people with all types of disabilities, enabling choice in living setting, full access to the community, and control of their life. CDR works for national, state, and local systemic change to advance the rights of people with disabilities by supporting direct action, coalition building, community organizing, policy analysis, litigation, training for advocates, and community education.