To: NYSBA Executive Committee / NYSBA House of Delegates

From: Deepankar Mukerji, Chair, Elder Law & Special Needs Section

Re: Recommendation for Affirmative Legislation to Repeal Lookback for Community Medicaid

Date: September 28, 2021

As part of the 2020-2021 New York State Budget (Chapter Law 56, Part MM Sections 13 and 14), New York Social Services Law (“SSL”) Section 366(5)(e) was amended to implement a transfer penalty for Medicaid-covered Community based long-term care services, specifically a penalty period of ineligibility for uncompensated transfers made within thirty (30) months of the month of application (the “30-month lookback”).

Despite its enactment more than a year ago, the 30-month lookback has yet to be implemented. This is indicative of the impracticality of the amendment, as well as the critical nature of the services that a 30-month lookback will prevent consumers from accessing. The ongoing public health state of emergency (“PHE”) has brought the likely consequences of the 30-month lookback into sharper focus; however, access to adequate and appropriate long-term home care services was a matter of importance before the COVID-19 PHE, and will undoubtedly remain as such when the COVID-19 PHE finally ends.

The ELSN opposed the amendment of SSL § 366 on a number of grounds and has advocated continuously against the implementation of the 30-month lookback in correspondence submitted to the New York State Legislature, the New York State Department of Health (“DOH”) and the Centers for Medicare & Medicaid Services (“CMS”). It is clear that the amendment creates more problems than initially anticipated. The ELSN opposed the legislation for several important reasons, including the fact that the imposition of the lookback would cause huge delays in accessing home care, resulting in backups in hospitals, pressure on spouses and caregivers, and unnecessary institutionalization that violates the Olmstead ruling enforcing the Americans with Disabilities Act, as follows:

1. The additional processing time will delay the receipt of long-term home care services by seniors and people with disabilities who have an urgent need for aides in order to remain safely at home.
The procedures for applying for Medicaid coverage of home care are critically different from the procedures for applying for Medicaid coverage of nursing home care. An individual may only apply for nursing home Medicaid if the applicant is already in a nursing home. The fact that the Medicaid application remains unprocessed for an extended period of time while DSS reviews financial records will not prevent the applicant from promptly receiving appropriate care in the nursing home. In contrast, a lookback for Community based long-term home care services would cause harmful delays for seniors and people with disabilities desperately in need of aide services in order to safely live at home. When a consumer applies for Medicaid to cover home care services, the applicant is not eligible to receive any Medicaid services until the application is approved. There are already delays in processing Medicaid applications for Community based long-term home care services without a lookback in place. If a lookback is added to the application process, approvals will likely take 6 months or more – notwithstanding a 45-day limit mandated by Federal regulations. During that time the applicant receives no Medicaid services at all, and may have no ability to pay privately. The applicant would have to wait until the local DSS concludes its exhaustive review of 30 months of financial records before MLTC services can be provided. If this lookback was imposed, a senior/disabled applicant who meets the MLTC resource and income guidelines, and is thereby otherwise eligible for Medicaid, may have to go without needed services for as much as a year, while the application is pending.

2. **Delayed access to necessary home care services will result in preventable injuries and other episodes leading to hospitalization, and impede the safe discharge of admitted patients, causing overpopulation at a critical time when we cannot afford to burden our healthcare facilities.**

A lookback for Community Medicaid will also negatively affect and quickly overload hospitals, impeding the ability to effectuate safe discharge plans. Consumers cannot receive care at home without a source of payment. Those individuals who are discharged without access to needed care at home may suffer falls or other episodes that result in what could have been an avoidable re-hospitalization.

3. **Implementation of the 30-month lookback will cause a backlog of cases at the Local Departments of Social Services**

Creating a new lookback period would add a tremendous administrative burden to an already backlogged DSS. Federal regulations mandate that an application be acted upon within 45 days of filing. As it stands now, DSS routinely takes many months (approaching a year at times in some upstate counties) to review an application. The State would also potentially run afoul of 42 USC 1396a(a)(8) requiring assistance to be provided with “reasonable promptness.”

4. **Implementation of the 30-month lookback violates the U.S. Supreme Court’s decision in *Olmstead*, which requires States to offer long-term home care**
services in the least restrictive setting.

In 1999, the U.S. Supreme Court held in *Olmstead v. L.C.* that States cannot discriminate against people with disabilities by offering them long-term care services only in institutions when they could be served in the community, given State resources and other citizens' long term care needs (*Olmstead v. L.C.*, 527 U.S. 581 (1999)). The Court found that the Federal Americans with Disabilities Act requires States to provide community based treatment for persons with disabilities when the (1) State's treatment professionals determine that such placement is appropriate; (2) affected persons do not oppose such treatment; and (3) placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with disabilities. The Court suggested that States could demonstrate their compliance by creating a comprehensive, effective working plan with a waiting list for community based services that moves at a reasonable pace. Although States are not required to change their policies and procedures, they may not, under *Olmstead*, reduce or make Medicaid eligibility for home and community services more restrictive than their existing program. This proposed change would clearly make New York's eligibility for home and community services more restrictive than its existing program. Imposing a penalty period for home care services would restrict access to home care services in such a way as to violate the *Olmstead* mandate.

5. **As amended, the legislation implementing the 30-month lookback would have an unfair, ex post facto application.**

The original legislation was put in the wrong section of the Social Services Law which applied to “transfers made on or after February Eighth, Two Thousand Six”. Social Services Law § 366 subdivision 5 (e). Using this date was contrary to the way past laws were structured and implemented and would cause the law to have an *ex post facto* effect. The DOH has recognized this and has informally indicated that despite the letter of the law, the law will only apply to transfers on or after October 1, 2020. But this discrepancy between the law and any regulations or policy directives will lead to confusion. Furthermore, the difference between the now postponed implementation date (see below) and the date which applies to transfers, has already caused confusion for Medicaid applicants and those who advise them.

6. **Amended SSL § 366 has an uncertain implementation date which causes significant confusion for seniors and people with disabilities and accelerates their decision to apply for Medicaid.**

Because of DOH's interpretation of the Federal Maintenance of Effort (MOE) provisions, there has been a continuously moving implementation date for the lookback, which now appears to be after July 1, 2022. The difference between the implementation date and the date which applies to transfers has caused a great deal of confusion for many seniors and people with disabilities. Some people who transferred
assets on or after October 1, 2020 have been, or will be, effectively, forced to apply for Medicaid home care services before they want them, in advance of the anticipated implementation date. This adds to the State’s Medicaid costs services that could have been met in other ways.

7. **Amended SSL § 366 creates confusion about whether the Homestead exemption will apply.**

The provision of New York State Budget Chapter Law 56, Part MM Sections 13 and 14, NY SSL Section 366(5)(e), as amended, to implement a new 30-month lookback period for home care services must be repealed as it also fails to make clear to which Homestead (homestead being a primary residence) transfer(s) the new law applies. The law as it currently exists applies the transfer penalty to a Homestead that is no longer the residence of an applicant for Institutional Medicaid (i.e., Nursing Home Medicaid). The new 30-month lookback period for home care services is problematic because it is unclear how the new law addresses the transfer of a Homestead for reasons other than to qualify for Medicaid because the ownership of a home does not disqualify an applicant from eligibility for Community based long-term care services (i.e., Community Medicaid).

Additionally, because the ownership of a home does not disqualify an applicant from eligibility for Community Medicaid and, therefore, its transfer, if any, must be for a purpose other than to qualify for Medicaid, the new 30-month lookback period for home care services contradicts the Federal law for transfer penalty exceptions under 42 USC §1396p(c)(2). For this reason, too, the new law must be repealed.

A number of the Homestead transfer exemptions in the current law apply to persons who live in the home with the applicant/recipient for a period of time immediately preceding the time the person became institutionalized (See the caretaker child and sibling with an equity interest exemptions). These exemptions no longer make sense in the context of community based long-term care services and need to be modified if the law is not repealed.

8. **Amended SSL § 366 creates confusion about whether pooled trusts can continue to be used to hold Medicaid Applicant’s excess income.**

The new law has also caused uncertainty as to the effect of prior and current transfers of income to a pooled supplemental needs trust which are currently exempt for Community Medicaid. The DOH (Medicaid Redesign Team II) proposes that the lookback period rules for home care services would be the same as the rules for the nursing home lookback in New York State. This would eliminate the use of pooled trusts to shelter assets and income in most home care cases. The pooled income trusts allow consumers to receive long-term care at home and to transfer their income to the
trust to help pay costs in the community. The current law incorrectly attributes the transfer of this excess income to a pooled trust as a penalized transfer of assets and the DOH has indicated that it will apply the transfer penalty on a monthly basis. This will needlessly disqualify seniors and people with disabilities from the Community Medicaid program and force them into nursing homes. Additionally, the law contains no language with respect to the application of the law to current Medicaid recipients who are participants in pooled trusts. This conflicts with the Federal law as it is more restrictive and contradictory to its intent. Moreover, if the new law is implemented, it will create an accounting nightmare for the local DSS offices, as they will be required to implement monthly auditing procedures to determine whether the payment to these pooled trusts have been or will be used for the pooled trust beneficiary within in the month of deposit. Furthermore, given the cost of living around New York State, precluding the use of pooled income trusts would force many people who would not otherwise need institutional care into facilities because they will be unable to pay their rent, maintain their home etc. This is likely to cause greater expense to the State of New York in both the short and long term.

9. **Amended SSL § 366 creates confusion about when the penalty period for uncompensated transfers begins, and may lead to longer than appropriate penalty periods.**

As enacted, the penalty on any determined uncompensated transfer of assets begins to run the “first day the otherwise eligible individual is receiving services for which Medical Assistance coverage would be available based on an approved application” but for the transfer of assets. However, the provision ignores the actual and practical differences between how Community Medicaid applicants “receive services” as opposed to those in nursing homes. In the Community setting, for non-institutionalized persons, it is almost impossible for the individual to receive services otherwise covered by Medicaid. Most Medicaid home care services are unique creations of statute, for which Medicaid payment may be made only after an assessment by a provider agency and a lengthy “prior approval” process. One cannot privately pay for MLTC or CDPAP services that Medicaid typically covers. An individual not receiving Medicaid may not obtain the required “prior approval” from the local DSS for Medicaid to pay for a licensed agency, especially since licensed agencies are generally not Medicaid providers and only provide Medicaid services when they contract with an MLTC. Because of this reality, where a person applying for Medicaid for home care services is determined to have a transfer penalty, the penalty period will never begin if it starts running only the first day the individual is RECEIVING services for which Medicaid would be available. Additionally, Medicaid would be available only if they have gone through the applicable prior approval system – whether the Maximus conflict-free eligibility assessment or the local DSS’s prior authorization procedure. Yet these systems are only available for people receiving Medicaid. Since the legislation provides no mechanism for an approval process, it is unworkable.
In addition, it is not clear how individuals already receiving services would be affected by the transfer of assets provisions. The law does not clearly state whether individuals who are already receiving services will be subjected to a lookback and penalized for transfers occurring within the lookback period. For example, if an individual already in receipt of Medicaid home care services were to receive an inheritance after October 1, 2020, would they be able to transfer the funds without penalty? The standard review process for existing cases is for the individual to submit the information at recertification; however, they are generally only documenting current assets at this time. Will a 30-month lookback now be required for these recipients? We also note that recertifications are currently automatic under the PHE, so no documentation is being submitted. If a transfer is made during this time, there is no explanation in the legislation of whether a transfer made now for a current recipient will at some point be reviewed later or what that later review will be.

10. As amended, SSL § 366 does not allow for undue hardship waivers for home care service applicants.

Social Services Law Section 366(5)(e)(4)(iv) directs the Commissioner of the DOH to develop a hardship waiver process to address situations where strict enforcement of the transfer of assets provisions “would deprive an individual of medical care such that the individual’s health or life would be endangered, or would deprive the individual of food, clothing, shelter, or other necessities of life.” The existing regulations make sense for nursing home residents but the DOH has stumbled in its attempts and has yet to consider how such a procedure would work for Community residents. For Community residents, the existing regulations essentially preclude any finding of undue hardship, when income is at or above the allowance, which would deny the opportunity for most home care applicants to demonstrate undue hardship.

The Section’s Legislative Proposal

The Elder Law and Special Needs Section continues to oppose this unimplemented change of law from the Governor’s 2020-2021 Budget for all the reasons listed above, and we believe the law should be repealed because of the problems we initially identified, and because of those that have been uncovered or have arisen since the law was enacted. As originally stated, the consequences of this law on regular New Yorkers include preventing seniors and people with disabilities from accessing necessary care, wreaking havoc on hospitals at a critical time and resulting in the institutionalization of more people in nursing homes because they simply cannot afford the private cost of care in their homes.

Since the availability of adequate and appropriate home care services for seniors and people with disabilities is an important public policy concern, the Elder Law and Special Needs Section recommends that the New York State Bar Association support affirmative legislation repealing those provisions of the 2020-2021 New York State Budget (Chapter Law 56, Part
MM Sections 13 and 14) that create a 30-month lookback period for Medical Assistance coverage of Community based long-term care services, as follows:

AN ACT to repeal provisions of the 2020-2021 New York State Budget (Chapter Law 56, Part MM Sections 13 and 14) relating to the creation of a 30-month “lookback period” for Medical Assistance coverage of Community based long-term care services

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Section 13 of Part MM of Chapter 56 of the Laws of 2020 is REPEALED.
§ 2. Section 14 of Part MM of Chapter 56 of the Laws of 2020 is REPEALED.
§ 3. This act shall take effect immediately.