

Memorandum in Support

February 6, 2024

S. 6414

By: Senator Skoufis
Senate Committee: Health
Effective Date: Immediately

AN ACT to amend the social services law, in relation to eliminating a “lookback period” for homecare for non-institutionalized Medicaid applicants; and repealing certain provisions of such law related thereto

LAW AND SECTIONS REFERRED TO: Section 366 (5) (e) of the New York SSL

The New York State Bar Association’s Elder Law and Special Needs Section (“ELSN”) supports S6414 which would eliminate a look-back period for home care for home health care Medicaid applicants.

There are a number of reasons to justify the repeal of the 30-month lookback. Even when enacted, the State projected only modest Medicaid state savings for the lookback-- \$5.5 million in State 2021 and \$11.75 M in 2022. (MRT II Executive Summary Scorecard). These projections failed to take into account the costs of implementation to the State as well as local districts, which will be especially burdened with demanding paperwork collection and reviews, at a time when they are grossly understaffed.

Any savings are also offset by costs to hospitals and rehabilitation facilities that will be unable to discharge patients safely and expediently with proper home care, thus causing increased costs for Medicaid coverage of hospital stays.

Since an individual may only apply for nursing home Medicaid after being admitted to a nursing home, delays while DSS reviews financial records do not prevent a nursing home resident from receiving appropriate care. In contrast, a consumer who applies for Medicaid to cover home care services is not eligible to receive any Medicaid services until the application is approved, which can take several months, and then while they go through the NY Independent Assessor (“NYIA”) system, and then enroll in an MLTC plan. Services rarely begin until 3-5 months after filing the Medicaid application. The local DSS agencies are already backlogged, failing to meet the 45- day time limit mandated by federal regulations to act upon a Medicaid application. 42 USC 1396a(a)(8)(requiring assistance to be provided with “reasonable promptness”); 42 C.F.R. Sec. 435.911. Many counties routinely take many months or even a year to review an application.

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A 30-month lookback will inevitably protract the application process to 6 months or more - notwithstanding the 45-day federal limit, and not even counting NYIA and MLTC enrollment. During that time the applicant receives no Medicaid services at all. While the lookback is intended to block the few who transferred assets from accessing Medicaid services, the resulting delays harm the majority of applicants whose assets are below the guidelines. They may have to go without needed services for as much as a year, while the application is pending, pushing many into a hospital or nursing home. The risk of nursing home placement will fall hardest on BIPOC communities, who are less likely to have retirement funds or other resources to privately pay for home care while waiting for Medicaid.

The 3-month lookback will also negatively affect and quickly overload hospitals, impeding the ability to effectuate safe discharge plans that require Medicaid home care. 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. The delays will also contribute to overpopulation in nursing homes and rehabilitation facilities. All these institutions are facing their own workforce pressures to meet current demand for services.

According to DOH's 1115 Waiver, a projected 3,800 applicants per year are expected to be subject to a transfer penalty due to the 30-month lookback if it is implemented. While the lookback is intended to block these few from accessing MA services, the processing delays will in effect block all applicants, the majority of whom are below the guidelines, from accessing MA services during the entire period the application is pending, pushing many into a hospital or nursing home as illustrated above.

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. 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 ADA's implementing regulations contain its community integration mandate, which requires state and local governments to "administer services, programs, and activities in the most integrated setting appropriate" to the needs of people with disabilities. 28 C.F.R. § 35.130(d). The regulations also require state and local governments to make reasonable modifications to policies, practices, and procedures to avoid disability-based discrimination, unless such modifications would fundamentally alter the nature of the service, program, or activity.

While it may appear that the community lookback is less harsh than the nursing home version, being 30 instead of 60 months, certain aspects of the lookback would apply more restrictively in the community, potentially violating *Olmstead*. For example, a transfer of a homestead is permitted

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only to a “caregiver child” or sibling who lived with and cared for the applicant for a specified period prior to the date the individual became institutionalized. No applicant for CB-LTC could take advantage of this penalty exception, since their relative would never meet the requirement of living with them prior to institutionalization. This inequity, along with the delays in access that will force consumers into nursing homes, violate *Olmstead*.

Because the ownership of a home does not disqualify an applicant from eligibility for Community Medicaid, transfer of a home must be for a purpose other than to qualify for Medicaid. Therefore transfer of the home should never be subject to a transfer penalty for eligibility for Medicaid for CB-LTC. 42 USC §1396p(c)(2). If lookback is not repealed, the implementing guidance must exempt such transfers.

Also, as stated above, the exemptions allowing transfer of the home to a caregiver child or sibling who live in the home with the applicant for a period of time immediately preceding the institutionalization would be denied to those seeking CB-LTC, potentially violating *Olmstead*. Responding to comments on its 1115 waiver submission to CMS, DOH stated that under federal law, it cannot extend these exemptions for those living in the community.² This inequity is best addressed by repeal of the lookback for CB-LTC.

The 30-month lookback coupled by its implementation delay is accelerating applications for MA & creating significant public confusion. Such confusion is thus increasing pressure on spouses and caregivers who are already overburdened.

For the above reasons, NYSBA’s Elder Law and Special Needs Section SUPPORTS the repeal of the 30-month Lookback.

² Comment on transfer of a home at: https://health.ny.gov/health_care/medicaid/redesign/mrt2/proposals/30-month_lookback-final.htm#_bookmark2.