New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Oppose Any Imposition of a Lookback for Home and Community Based Waivered Services

ELDER LAW AND SPECIAL NEEDS SECTION

Elder #9 March 9, 2020

INTRODUCTION

When a nursing home resident applies for Medicaid reimbursement for long-term nursing home care, the local Department of Social Services ("DSS") must review all of the financial records for the applicant and their spouse for the past five years before determining eligibility. As part of this financial review, the DSS considers whether any assets were transferred during the five year "lookback" period. Generally, if there was a transfer, Medicaid will not reimburse for nursing home care for a comparable period of time, based on the amount transferred. This is called a "transfer penalty." The larger the transfer, the longer the penalty period. Reviewing five years of financial records often takes as much as six months to a year. Although the applicant continues to receive nursing home care during the financial review, this extensive and burdensome review affects all consumers (as well as the DSS), regardless of whether the consumer possessed any assets.

New York follows the longstanding federal practice of mandating a lookback for nursing home care, but not for community-based long term care. As is described in detail below, imposing a lookback on community-based services would cause huge delays in accessing home care, causing backups in hospitals, pressure on spouses and caregivers, and unnecessary institutionalization that violates the *Olmstead* ruling enforcing the Americans with Disabilities Act. New York must not now implement a new lookback requirement for community-based long term care.

Needy Elderly/Disabled Will Have Delayed Access to Care and Services

The procedures for applying for Medicaid home care are different in critical ways than those for applying for Medicaid for nursing home care. One can only apply for Medicaid for nursing home care if she 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 receiving appropriate care in the nursing home.

In contrast, a lookback for community-based care would cause harmful delays for seniors and people with disabilities desperately in need of aide services to live safely at home. When a consumer applies for Medicaid to cover Managed Long Term Care or other home care, 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 care *without* a five-year lookback. 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 five years of financial records before MLTC services can be provided. **To impose a lookback only increases the demands on the spouse and children who are unable to provide the care sought from Medicaid.** Thus, if this lookback was imposed, a senior/disabled applicant who meets the MLTC resource and income guidelines, and is thereby otherwise eligible for Medicaid, could have to go without needed services for as much as a year, while the application is pending.

Adverse Impact on Hospitals

A lookback for community Medicaid will also negatively affect, and quickly overload, hospitals, stymying 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.

Impact on Local DSS

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

Start Date for a Penalty

New York's MLTC Community Care program is under a Section 1115 waiver. A federal policy for triggering the lookback and start of the penalty period does not currently exist - there is no CMS guidance whatsoever on a lookback for such waivered services.

Establishing a Lookback for Community Based Services Violates *Olmstead*

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, effectively working plan and having a waiting list for community 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.