

**MEMORANDUM IN SUPPORT
S6414 -A9278 and Senate One-House**

A bill to repeal the 30-month lookback for community-based long term care services enacted in the SFY 2020-21 budget

The New York Legal Assistance Group (NYLAG) supports this legislation.

The Lookback for Community-Based Long Term Care Services Should be Repealed.

The 30-month lookback was enacted in April 2020, in the height of the COVID pandemic, without having even been proposed in the Governor's budget – without any public notice and opportunity for input. Implementation has been blocked since then because of federal COVID laws that banned states from restricting eligibility during the pandemic. Now is the time to repeal this law – which otherwise will be implemented in 2025.

The Lookback will not Save Money for the State. 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 to the State are also offset by costs to hospitals and rehabilitation facilities that will be unable to discharge patients safely and expediently with proper home care, which will be extremely delayed, thus causing increased costs for Medicaid coverage of hospital stays.

The Lookback Exacerbates Racial Disparities in Access to Health Care. Those who DO have assets to transfer will use trusts and other Medicaid planning techniques to circumvent the lookback and avoid a transfer penalty. Because of a host of discriminatory policies over many decades, applicants who are Black, Indigenous and People of Color (BIPOC) are far less likely to own their homes or have retirement funds – assets that are exempt for Medicaid eligibility.¹ A white applicant can keep a \$1 million home or \$1 million IRA without any need to transfer it, so these assets will not be affected by the lookback. Yet a BIPOC widow who has just \$60,000 in life savings must transfer half of that to be eligible for Medicaid. Imposing a transfer penalty on these savings deprives such applicants of funds desperately needed for living expenses – property taxes, home or car repairs, which white people are more likely to afford using their IRA's. This disparity is

¹ NYS Attorney General, *Racial Disparities in Home Ownership*, 10/31/23 available at <https://ag.ny.gov/sites/default/files/reports/oag-report-racial-disparities-in-homeownership.pdf>; AARP, *The Racial Retirement Gap in 7 Facts*, 2/5/24, available at <https://tinyurl.com/AARPRacialRetirement>.

why NYLAG supports **repeal of the asset test** entirely, as proposed in A.5940-A/S.4881-A and that the Senate included in their One House Bill.²

The Lookback Will Compound Existing Delays for Home Care – Which is Already Delayed because of the NY Independent Assessor – and will Push People into Nursing Homes – Violating the Americans with Disabilities Act (ADA)

According to DOH’s 1115 Waiver request to CMS to permit it to impose a lookback for MLTC, 3,800 applicants per year are expected to be subject to a transfer penalty due to the 30-month lookback if it is implemented.³ While the lookback is intended to block these few who will have a transfer penalty from accessing MA services, the processing delays will block *all applicants*, the majority of whom have assets 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 NYC Human Resources Administration and county Medicaid agencies have lost thousands of workers and are struggling to keep up with new Medicaid applications, the renewals that re-started with the “unwinding” of the Public Health Emergency, and many other responsibilities. The lookback will add more burden to these agencies and more delays for applicants.

Delays will push applicants into Nursing Homes – The 5-year lookback required for Medicaid nursing home coverage does not delay access to nursing home care because those applications with the lookback review are processed while the individual is already in the nursing home. But for an applicant for Medicaid home care, services cannot start until the local district approves the application, the consumer is assessed by the NY Independent Assessor and enrolls in an MLTC plan. Even now, services rarely begin until 5 months after filing the Medicaid application, despite the 45- day time limit mandated by federal regulations to process a Medicaid application. 42 USC 1396a(a)(8);42 C.F.R. Sec. 435.911. The lookback will add even more delay. Those who cannot wait 6+ months for services will be forced into a 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.

² See Statement in support at <https://medicaidmattersny.org/wp-content/uploads/2024/02/asset-test-bill-support-memo-final.pdf>.

³ NYS 1115 request, which is still pending with CMS, is available at https://health.ny.gov/health_care/medicaid/redesign/mrt2/proposals/30-month_lookback-final.htm. NYLAG’s comments on this proposal are available at <http://health.wnyc.com/health/download/778/>.

The 30-month lookback violates the U.S. Supreme Court’s decision in *Olmstead*, interpreting the ADA which requires States to offer long-term home care services in the most integrated 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); 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 home is permitted to a “caregiver child” or sibling who lived with and cared for the applicant for a specified period before the individual became institutionalized. No applicant for home care could take advantage of this penalty exception, since their relative would never meet the requirement of living with them *prior to institutionalization*. NYS DOH has stated that under federal law, it cannot extend this exemption to those living in the community,² and that any transfer of the home would cause a transfer penalty, even though normally transfer of a home does not affect eligibility for Community Medicaid. Similarly, an exemption under federal law that exempts transfers from any penalty if they would cause undue hardship is meaningless as defined in NYS regulations, since it could not apply to anyone who has a “spend-down.” These inequities – that would force people into nursing homes in violation of *Olmstead* -- can only be addressed by repeal of the lookback for community-based long-term care.

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