

MEMORANDUM IN SUPPORT
A1907 (Paulin, Davila)/ S04786 (Skoufis, Cleare)

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 that would repeal the 30-Month Lookback for Community-Based Long Term Care Services.

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 later 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. Also, the SFY 2023 budget nearly doubled both the Medicaid income and asset limit, reducing the need for many applicants to transfer assets or reducing the amount of their transfers – reducing the savings as projected in 2021.

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 because accessing home care will be extremely delayed.

The Lookback Exacerbates Racial Disparities in Access to Health Care. The lookback penalizes transfer of countable assets. But one’s home or retirement accounts are exempt for Medicaid eligibility so an applicant may keep them and still qualify. 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 IRA’s.¹ A white applicant can keep a \$1.097 million home or \$1 million IRA without any need to transfer it, while a BIPOC widow who rents must spend-down half of her \$65,000 in life savings to be eligible for Medicaid. She needs those assets for living expenses and emergencies – property taxes, home or car repairs, which white people are more likely to afford using their IRA’s. This disparity is why NYLAG is part of a coalition that supports **repeal of the asset test** entirely.² Those who DO have liquid assets to transfer will use trusts and other Medicaid planning

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>.

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

techniques to circumvent the lookback and avoid a transfer penalty. It is those with the most modest savings that will be harmed – who are very often BIPOC.

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.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 are poor -- from accessing MA services during the lengthy period the application is pending, pushing many into a hospital or nursing home. 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 ongoing renewals 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 – It may appear that a lookback for home care of only 30 months is less onerous than the 5-year lookback required for Medicaid nursing home coverage. On the contrary, the nursing home lookback 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* receiving care. Once the application is approved, Medicaid pays the nursing home for that care retroactively. 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 then enrolls in an MLTC plan. Even now, services rarely begin until 5 months after filing the Medicaid application. The lookback will add even more delay. Those who cannot wait 5+ months for services will be forced into a nursing home or will be stuck in a hospital because a safe discharge is not possible. The risk of nursing home placement will fall hardest on BIPOC communities, who are less likely to have retirement or trust funds they can use to privately pay for home care while waiting for Medicaid. Those individuals who are discharged from the hospital without needed care at home may suffer falls or other episodes, sending them back to the hospital.

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,

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/>.

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. But an applicant for home care may not transfer their home to a “caregiver child” because that term requires the child to live with them *prior to institutionalization*. NYS DOH has confirmed they cannot adapt this definition to make sense for those applying for home care -- so any transfer of the home even to a daughter who lived with and cared for her mother for years before her mother applied for home care would cause a transfer penalty.

Similarly, an exemption under federal law exempts transfers from any penalty if they would cause “undue hardship.” The definition of undue hardship was written for the nursing home setting and, as defined in NYS regulations, could not apply to anyone who has a Medicaid “spend-down,” meaning they must spend down their income on the cost of medical care to the extent it exceeds 138% of the Federal Poverty Level. 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.

FOR MORE INFORMATION CONTACT

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