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

Memorandum to Repeal Amendment to SSL 366(5)(e)

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER #2 March 9, 2021

INTRODUCTION

As part of the New York State Budget Chapter Law 56, Part MM Sections 13 and 14, NY SSL Section 366(5)(e) was amended to implement a 30-month lookback on home care services. At that time, the Elder Law and Special Needs Section of the New York State Bar Association opposed the proposal on a number of grounds as briefly recapped below. It is now clear that the passage of the amendment to NY SSL Section 366(5)(e) to implement a 30-month lookback on home care services has created additional issues and problems. For all of these reasons stated below, the amendment of the law should be repealed.

We had initially opposed this change in the law because we believed instituting a home and community based eligibility lookback period would cause the following problems:

a. Prevent needy elderly/disabled from accessing care and services – for months or even a year. An individual may only apply for Medicaid for nursing home care if the individual 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 does not prevent the applicant from promptly 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. 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.
b. Wreak havoc on hospitals, causing crowding at a critical time when we cannot be adding burdens on our healthcare facilities. A lookback for community Medicaid will 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.
c. Have an adverse 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 several months (approaching a year at times in some upstate counties) to decide on an application. The State would also potentially run afoul of 42 USC 1396a(a)(8) requiring assistance to be provided with "reasonable promptness."

d. Result in the institutionalization of more people because they will not be able to afford to stay in their homes;
e. Directly violate *Olmstead v. L.C.*, 527 U.S. 581 (1999), the US Supreme Court case which holds that states cannot discriminate against people with disabilities by offering them long-term care services in institutions when they could be served in the community. States may not, under *Olmstead*, reduce or make Medicaid eligibility for home and community services more restrictive than their existing program. The imposition of a look back for community based long term care clearly violates *Olmstead.*

In addition to the foregoing, the passage of the amendment to NY SSL Section 366(5)(e) to implement a 30-month lookback on home care services has created these additional issues and problems:

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 Department of Health 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.

UNCERTAIN IMPLEMENTATION DATE

Because of DOH's interpretation of the Federal Maintenance of Effort (MOE) provisions, there has been a continuously moving implementation date for the look back, which now appears to be after January 1, 2022. The difference between the implementation date and the date which applies to transfers has caused a great deal of confusion for many infirmed and elderly consumers. There are many individuals who although technically eligible for Medicaid and community based services, have chosen not to apply but to avail themselves to services provided by family members or members of the community or to pay for services with funds supplied by a non-legally responsible relative. However, if such persons have made transfers after October 1, 2020, it has accelerated the date they have chosen to apply for Medicaid long term care services in order to obtain Medicaid covered services before the potential implementation of a transfer penalty date, thus costing the State Medicaid funds and compelling consumers to apply for long term care services that could alternatively be provided at this time.

HOMESTEAD EXEMPTION CONFUSION

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 look-back 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 look-back 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 look-back 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 care and need to be modified if the law is not repealed.

POOLED TRUST UNCERTAINTY

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-based Medicaid. 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 infirmed and elderly New Yorkers from the Medicaid home care 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.

NEVER ENDING PENALTY PERIOD

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 cover. An individual not receiving Medicaid may not obtain the required "prior approval" from the local district 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 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 district'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 the time. Will a 30 month lookback now be required for these recipients? We also note that recertifications are currently automatic under the Public Health Emergency, 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.

NO REMEDY FOR UNDUE HARDSHIP

Social Services Law Section 366(5)(e)(4)(iv) directs the Commissioner of the Department of Health 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 Department of Health 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.

As such, there is no recourse for an applicant in the community where transfers have been made and cannot be returned through no fault of the applicant.

CONCLUSION

The Elder Law and Special Needs Section continues to oppose this unimplemented law from the Governor's 2020-21 Budget for all the original reasons we have listed. In addition, we believe the law should be repealed because of the problems we have stated that have been uncovered or have arisen since the law was enacted. As originally stated, the consequences that this law will have on regular New Yorkers will be to prevent needy elderly/disabled from accessing care, wreak havoc on hospitals, causing overcrowding at a critical time and result in the institutionalization of more people in nursing homes because they will not be able to afford to stay in their homes and cost New York State more to cover their care in the end. And if this law is not repealed, it will continue to cause confusion because of both the subsection where it is listed and the fact that the implementation date remains uncertain.