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# Elder Law & Special Needs 2021: Year in Review

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# Agenda



1. Medicaid & COVID update generally
2. Home care lookback implementation update
3. Legislative Activity
  - Visitors during emergencies
  - Special education age extension
  - Special needs child support age extension
  - Reimagining long term care
  - Addressing the Caregiving Crisis
  - Supportive Decision Making
- Case Notes/Administrative Notes
  - Hospital Guardianship for Discharge case
  - Pooled trust transfer treated as for less than FMV
  - Home care staffing obligations during the pandemic
  - GAL petition to create 1<sup>st</sup> party SNT

# Medicaid & COVID

## Families First Coronavirus Relief Act

- signed March 18, 2020
- contained 2 maintenance of effort requirements for states to receive an increase in the federal Medicaid contribution amount.

1. Moratorium imposed on individual Medicaid case closings and reductions in services for anyone covered by Medicaid on March 18, 2020 or anyone who became enrolled after that date UNTIL the end of the month in which the Public Health Emergency ends. (§6008(b)(3))
  - ▶ Current Update: 12-month automatic renewal for all Medicaid recipients with authorizations ending on or before January 30, 2022.
2. States are not allowed to make eligibility determinations and policy requirements more restrictive than they were on Jan 1, 2020 until the end of the quarter in which the Public Health Emergency ends. (§6008(b)(1))

<https://www.congress.gov/bill/116th-congress/house-bill/6201/text?overview=closed>

# Public Health Emergency (PHE)

- ▶ Current Update: Public Health Emergency was recently extended until **Jan. 15, 2022**.  
<https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVIDI-15Oct21.aspx>
- ▶ Likely to last at least a few months beyond that – 60 days notice promised
  - when a decision is made to end the public health emergency or let it expire, the federal government has promised that 60 days' notice will be provided by the Department of Health & Human Services to the state Governors prior to any termination of the public health emergency. Letter from the Secretary of the Department of Health & Human Services to State Governors, 1/22/21, <https://ccf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf>

# Medicaid & Covid

## American Rescue Plan of 2021, §9817

- signed March 11, 2021,
- Home & Community Based Services Enhanced Federal Matching Program – additional 10% to strengthen & invest in home and community based services for Medicaid beneficiaries.

1. According to the guidance to the state Medicaid directors: states must use state funds equivalent to the amount of federal funds attributable to the increased FMAP (federal medical assistance percentage) to implement or supplement the implementation of one or more activities to enhance, expand, or strengthen HCBS under the Medicaid program. <https://www.medicaid.gov/federal-policy-guidance/downloads/smd21003.pdf>
2. To demonstrate compliance with the requirement not to supplant existing state funds expended for Medicaid HCBS, states must Not impose stricter eligibility standards, methodologies, or procedures for HCBS programs and services than were in place on April 1, 2021

<https://www.medicaid.gov/medicaid/home-community-based-services/guidance/strengthening-and-investing-home-and-community-based-services-for-medicaid-beneficiaries-american-rescue-plan-act-of-2021-section-9817-spending-plans-and-narratives/index.html>

NY HCBS spending plan: <https://www.medicaid.gov/media/file/nys-hcbs-spending-plan-draft0.pdf>

# Community Medicaid Lookback Update

Implementation postponed to no sooner than **April 1, 2022** but more likely no sooner than July 1.

1. Families First Act & American Rescue Plan prohibit states from restricting eligibility for Medicaid until after the quarter in which the PHE ends.

- PHE extended to 1/15/2022 – takes us to 4/1/2022 unless PHE further extended.

2. Spring 2021 DOH applied for amendment to waiver program to implement 30 month lookback – not clear if it will be approved.

- MOE legislative requirements
- Argument that length of statutory lookback period is not listed among provisions that may be waived under Social Security Act [Title 11 Section 1115](#)

NY Waiver Request: [https://health.ny.gov/health\\_care/medicaid/redesign/mrt2/proposals/docs/30-month\\_lookback-final.pdf](https://health.ny.gov/health_care/medicaid/redesign/mrt2/proposals/docs/30-month_lookback-final.pdf)

# Other Changes Taking Effect At a “Later Date”

## 3 ADL requirement

- Currently there is a 2 ADL requirement for Medicaid eligibility
- Must need *at least limited assistance with physical maneuvering* with more than 2 ADLs
- Exception: those with dementia or Alzheimer's will only require cuing or supervisory assistance with 2 ADLs

**Standardized task-based assessment tool to determine hours.**

# Other Changes Taking Effect At a “Later Date”

## Independent Assessor Procedures

- Home care services to be prescribed by a “qualified independent physician selected or approved by” DOH.
  - Currently, the Medicaid recipient’s treating physician can prescribe these services.
- An independent assessor will determine hours. The assessor will also conduct extra reviews of high-hour cases to see if recipients are safely living in the community.

[https://www.health.ny.gov/health\\_care/medicaid/redesign/mrt2/recommends/pas-cdpas\\_reg\\_chg.htm](https://www.health.ny.gov/health_care/medicaid/redesign/mrt2/recommends/pas-cdpas_reg_chg.htm)



NOTE: 2 regulatory changes became effective Nov 8, 2021

1. LDSS and MCOs requirement to inform clients about the CDPAP program has been removed(18 NYCRR §505.28(h)(1));

2. Easier for MLTC plans to reduce services for new members who were required to transfer to that plan

[HTTPS://WWW.HEALTH.NY.GOV/HEALTH\\_CARE/MEDICAID/REDESIGN/MRT2/RECOMMENDS/PCS-CDPAS\\_REG\\_CHG.HTM](https://www.health.ny.gov/health_care/medicaid/redesign/mrt2/recommends/pas-cdpas_reg_chg.htm)

# NY Legislative Activity

- Visitors during emergencies
- Special education age extension
- Special needs child support age extension
- Reimagining long term care
- Addressing the Caregiving Crisis
- Supportive Decision Making

# Personal and Compassionate Care Visitation in Nursing Homes & Adult Care Facilities

- Total ban on nursing home visitation until February 19, 2021.  
(<https://www.governor.ny.gov/news/governor-cuomo-announces-nursing-home-visitations-resume-accordance-cms-and-cdc-guidelines>)
- A1052(b)/S614, signed 3/29/2021 - Regulates visitation of personal care visitors and compassionate care visitors at nursing homes and adult care facilities to allow personal care giving visitation for routine and compassionate care and support by family members and legal guardians of residents of nursing homes and other residential health care facilities.

Compassionate care would include support for residents facing end-of-life care or significant physical, mental or social decline.

# Special Education Age Extension

- School districts have an obligation to provide free and appropriate public education for children with disabilities through age 21. (20 USC §1412(a)(1))
- Due to COVID, many students aging out of the services did not receive the planned transition services or diplomas/credentials pursuant to their IEPs.
- Department of Education strongly encouraged school districts to allow students to stay an extra year. (Letter from NY State Dept. of Education, April 13, 2021)  
<http://www.nysed.gov/common/nysed/files/programs/coronavirus/memo-over-age-students.pdf>

# Special Education Age Extension (cont.)

S07192/A08021 – signed June 29, 2021

- Legislation authorizing school districts to provide educational services in 2021-2022 & 2022-2023 school years for people with disabilities who turned 21 during the 2019-2020 or 2020-2021 school years who were enrolled in their school district & received services pursuant to an IEP.
- Statute permits school districts to provide such services until the student “completes” their IEP or turns 23.
  - ❖ Statute does NOT define “complete.”
  - ❖ Statute does NOT mandate extension

<https://legiscan.com/NY/bill/A08021/2021>

# Child Support Extension for Children with Developmental Disabilities

- Child support generally continues until either age 18 or 21 for children in New York
- New legislation signed into law that allows the custodial parent of a child with a developmental disability to seek child support until age 26. ([§4467B/A00898B](#), October 8, 2021)
  - NOTE: NY is not alone joining many other states to extend child support for children with developmental disabilities. <https://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx>
- Developmental Disability (as defined in Mental Hygiene Law § 1.03) requires
  - the disability began before the child turned 22
  - the disability expected to continue indefinitely
  - the disability is a substantial handicap to the child's ability to function normally in society

# Reimagining Long Term Care

## A3922A/S598B - Reimagining Long Term Care Taskforce Act

- Legislation to create a Long Term Care Taskforce to study the state of long term care services options and challenges as well as reimagine how the state can better meet the existing and projected needs in ways that prioritize safety, affordability, and quality of life in New York.
- Status:
  - Passed Senate Feb 22
  - Passed Assembly March 3
  - Bill still needs to be sent to the Governor for signature.
- The bill will take effect immediately once signed by the Governor.

[https://assembly.state.ny.us/leg/?default\\_fld=%0D%0A&leg\\_video=&bn=A3922A&term=2021&Summary=Y&Actions=Y&Memo=Y&Text=Y](https://assembly.state.ny.us/leg/?default_fld=%0D%0A&leg_video=&bn=A3922A&term=2021&Summary=Y&Actions=Y&Memo=Y&Text=Y)

# Watching Washington State



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Long term care insurance benefit for all eligible workers through a payroll tax being implemented on 1/1/2022

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Payroll tax: Employee Contribution will be \$0.58 per \$100,000 earned with no employer contribution

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Exemptions available for those with qualifying long term care coverage already in place by 11/1/2021

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Benefit the program provides to all those eligible: \$36,500 lifetime benefit

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Eligibility for Benefits: 3 of 10 ADLs including cognitive

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People can begin receiving benefits 1/2025 with detailed work & contribution requirements

<https://wacaresfund.wa.gov/private-insurance/>



# Addressing the Caregiving Crisis

“Caregiving is in crisis in New York State. New York State is facing an unprecedented elder boom. The population is aging, and people are living longer. These trends have accelerated over time. The COVID-19 crisis has also laid bare the challenges facing the child care industry, as providers have shuttered and parents have faced unprecedented challenges of working from home while also juggling child care and remote learning. Many families also face the challenge of sandwich care, providing care simultaneously to young children and aging loved ones. *There is increasing demand for support for every type in the field of caregiving, but our extant models are proving inadequate to meet the moment.*” (emphasis added)

<https://www.nysenate.gov/legislation/bills/2021/s4652/amendment/a#:~:text=The%20Invest%20in%20Care%20Act,supportive%20caregiving%20of%20all%20sorts.>

## Investing In Care Act - A6590B/S4652A

Commissioners of Economic Development,  
Health, Labor and the Office of Children and  
Family Services to

- Incorporate the caregiving sector as part of the state's economic development strategy
- Study, develop and implement a long-term strategy to support the growth of the caregiving industry in NYS

Status: passed by Senate & Assembly;  
awaiting Governor's signature

<https://www.nysenate.gov/legislation/bills/2021/s4652/amendment/a#:~:text=The%20Invest%20in%20Care%20Act,su pportive%20caregiving%20of%20all%20sorts.>

# Supportive Decision Making

When people with intellectual or developmental disabilities choose trusted persons to support them, in whatever ways they need, in order to make their own decisions. Can be formal or informal.

**SDM Roles:** <https://sdmny.hunter.cuny.edu/wp-content/uploads/2020/10/326GMR-Mentor-Guide-November-2019-clean-FINAL-4.27.2020.pdf>

- Decision Maker (DM) - drives the process.
- Facilitator - trained volunteer who assists the process
- Mentor – supervises the facilitator
- Supporter - family member, friend, paid staff selected by the DM who pledges to:
  - ▶ provide support as described in the agreement;
  - ▶ refrain from acting as a substitute DM;
  - ▶ to avoid conflicts of interest; and
  - ▶ not exert undue influence.

➤ Diversion/Restoration pilot program underway (<https://sdmny.hunter.cuny.edu/>)

## SDM 4 Main Questions:

1. Which areas DM wants decision support (financial matters, health care, etc.)
2. Who is chosen to provide that support (trusted persons in the DMs life)
3. What kinds of support; and
4. How support will be provided

# Supportive Decision Making Bill – S7107

1. “Capacity” for these purposes
  - Presumption of capacity unless that adult has a legal guardian, appointed by a court of competent jurisdiction, whose granted authority is in conflict with the proposed SDMA;
  - Presumption of capacity can only be rebutted by clear and convincing evidence.
  - Capacity includes capacity with decision-making support and/or accommodations.
  - A diagnosis of intellectual, developmental, or other disability shall not constitute evidence of incapacity.
  - The manner in which an adult communicates with others shall not constitute evidence of incapacity.
2. Sets forth the required contents of the agreement but specifically does not provide a statutory form.
3. Defines the legal effect of decisions made with support and third-party obligations/liability limitations

Status: passed the Senate on June 7<sup>th</sup>, referred to the Assembly expected to be taken up in next legislative session. <https://www.nysenate.gov/legislation/bills/2021/s7107>

# Cases of Note

1. Hospital Guardianship for Discharge case
2. Pooled trust transfer treated as for less than FMV
3. Home care staffing obligations during the pandemic
4. GAL petition to create 1<sup>st</sup> party SNT

# Hospital Guardianship for Discharge

**Matter of Elias B.** (72 Misc.3d 1204(A), June 30, 2021)

Article 81 proceeding brought by hospital petitioner for guardianship over Elias B. for discharge purposes

- Hospital social worker said discharge needed to be to skilled nursing facility; hospital psychiatrist determined Elias B. lacked capacity to manage his own discharge planning.
- Elias B. objected to and refused both the discharge to the skilled nursing facility & the guardianship appointment wanting to return to his pre-hospitalization services and resources.
- Court's decision is based on balancing of Elias B.'s right to maximum independence and assessment of the available options. The Court recognized that Elias B.'s decisions are not ones most other people would make but wouldn't unduly substitute its judgment for his.
- Guardianship denied.

# Pooled Trust Funding Decisions

2 recent SSI ALJ decisions finding against agency determining that funding a pooled trust was considered a transfer for less than fair market value to SSI beneficiary.

- ▶ Shirley W. - May 4, 2021 - FMV can include in-kind support or services received before, at, or after the actual time of transfer.

Determining FMV for pooled trust transfer looked at:

- The range of services offered by the trust and available now and in the future;
- The relative investment value of a pooled trust; and
- The person's life expectancy

- ▶ Sara A – June 16, 2021 no rationale or evidence to support the initial agency conclusion that the beneficiary did not get fair market value
  - ▶ She retained beneficial ownership of the assets for her benefit only, the value of the assets [after transfer] remained unchanged as indicated in the bank account records and she will have valuable consideration within her life expectancy

# Home care staffing obligations during the pandemic

FH# 8278733Z - March 22, 2021

- Background:
  - Appellant authorized for 24/7 live-in Personal Care Services but Agency unable to staff.
  - Offered Appellant 12/7 with familial informal supports attending to the Appellant's needs for the remaining 12 hours.
- Agency's responsibility to meet the needs of the consumer & the record did not support the position that the utilization of other potential supports would sufficiently meet the Appellant's needs.
- Agency directed to authorize 24/7 split shift Personal Care Services until a live-in aid can be provided.



# GAL petition to create 1<sup>st</sup> party SNT

**Matter of S.E.M** (147 NYS 3d 886, Surrogates Court, Broome County, June 8, 2021)

- Background:
  - Mother dies, adult daughter is person under disability, GAL appointed to represent the adult daughter in the Mother's estate proceeding
  - Estate passed to adult daughter's pre-existing SNT
  - GAL uncovered 2 annuities payable by beneficiary designation directly to the adult daughter, rather than the pre-existing SNT
  - GAL petitioned court to create 1<sup>st</sup> party SNT for adult daughter to receive the funds
- Court authorized GAL to petition for creation of first party SNT to receive non probate assets on behalf of disabled designated beneficiary.

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