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Getting out or Staying out of a Nursing Home

Medicaid Home Care
Strategies & Obstacles

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ABOUT NYLAG

The **New York Legal Assistance Group** (NYLAG) is a leading non-profit that provides free civil legal services, financial counseling, and engages in policy advocacy efforts to help people experiencing poverty.

The **Evelyn Frank Legal Resources Program** represents seniors and people with disabilities on health care access issues, maintains www.NYHealthAccess.org, trains professionals, and advocates on a policy level to improve health & long term care access.

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Backgrounder: Types of Medicaid Home Care in NY

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Medicaid Personal Care & CDPAP Basics

BOTH PROVIDE ASSISTANCE WITH:

- **Activities of Daily Living (ADLs)** :
  - Bathing
  - Dressing
  - Grooming
  - Toileting/Incontinence care
  - Transferring
  - Walking/ambulation
  - Eating
  - Medication reminding/ set up
  - Routine skin care

  a/k/a "Level II" tasks*

- **Instrumental ADLS –(IADLs)**
  - Meal preparation
  - Cooking, Shopping, Cleaning,
  - Assistance with Phone, Transportation

a/k/a "Level I" tasks*

- Actual services given depends on the patient's needs
- Under Rodriguez 2nd Circuit decision, needing general "supervision" is not enough; Must need supervisory assistance with safe performance of ADLs by verbal cueing or physical assistance– this is not "safety monitoring," which is not covered if not connected to an ADL. NYS DOH GIS 03 MA/003 ;

* 18 NYCRR 505.14(a)

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Types of Medicaid Home Care in NYS

1. **PERSONAL CARE SERVICES (PCS)** assistance of a personal care aide where essential to the maintenance of patient. Includes:
   a. **Level I – Housekeeping (shopping, cooking, cleaning, meal prep)** – (IADLs) max 8 hours/wk if no Level II services needed.
   b. **Level II – Personal Care** – (ADLs) – up to 24-hour continuous "split shift" care for assistance with ADLs and IADLS (more on def'n. 24-hour care later) (aide does both Level I and II tasks).

- Aide may not do "skilled" care – injections, put pill in mouth, suction trach, wound dressing. See 1992 "Scope of Tasks" http://www.wnylc.com/health/download/46/
- Client must be "self-directing" or have someone to direct care. See 92 ADM-49

http://www.wnylc.com/health/entry/7/

NY Soc. Serv. Law. §365-a, subd. 2(e); 18 NYCRR 505.14

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Types of Medicaid Home Care in NYS

2. **Consumer Directed Personal Assistance Program (CDPAP)** 18 NYCRR 505.28

Covers same services as Personal Care levels I and II (ADLs and IADLs) with these differences:

- "Personal assistants" (PA) may do **SKILLED** tasks normally requiring a nurse (suction trach, tube feeding, injections).
- Instead of licensed home care agency hiring, training and scheduling aides, PA's are independent contractors registered with & paid by a "Fiscal Intermediary."
- Client or person directing care must recruit, train & schedule aides, including back-ups. Immigrants must have work authorization.
- Aide may be client's adult child, the parent of a child > 21, or other relative, but can't also be the person directing care. 505.28(b)(3)

http://www.wnylc.com/health/entry/40/

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Types of Medicaid Home Care in NYS

3. CHHA – Certified Home Health Agency

Agency "certified" under Medicare and Medicaid to provide:

1. "Visiting nurse" services ("part-time or intermittent"),
2. physical, occupational or speech therapy (PT/OT) in home,
3. "home health aide" (HHA) services - may perform semi-skilled tasks because under RN supervision, unlike PCS – see scope of tasks https://tinyurl.com/HHAScope-of-Tasks
4. and medical supplies.

Medicaid more generous than Medicare in CHHA coverage - (Medicaid HHA can be up to 24/7, no "homebound" requirement)

Find a CHHA or hospice - https://profiles.health.ny.gov/home_care

NY Social Services Law [SSL] §§365-a(2)(d), 367-j; 18 NYCRR §505.23 and Appendix I, 10 NYCRR §763.5

http://www.wnylc.com/health/entry/40/

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Types of Medicaid Home Care in NYS

4. **Private Duty Nursing** 18 NYCRR 505.8, 505.13

- LPN or RN services on an hourly basis, in shifts, for persons who need skilled nursing care for longer periods than a "visiting nurse" visit by a CHHA. May be shifts up to 2x12 hours/day x 7 days/week
- Skilled needs include tube feeding, oxygen admin., suctioning of tracheostomy, injections, wound care
- DOH 08-INF–5 - Guide to Accessing Medicaid Private Duty Nursing Services in the Community - procedures for applying for those not in MLTC or managed care, requires decisions to be made within 21 days. Explains can obtain a list of Medicaid private duty nurses by calling Medicaid helpline at 1-800-541-2831 and online at www.homecare.nyhealth.gov.
- MLTC Policy 13.07 – this service part of MLTC package

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WHERE to access LTC services

Since 2011, most NYS Medicaid recipients must access all LTC services cited above through a **managed care plan**, with some exceptions. Plans must give same amount, duration & scope of services as in "Fee for Service."

1. **Medicaid recipients without Medicare** – Most must enroll in "mainstream" Medicaid managed care plans (**MCO**) that deliver ALL medical care, including PCS, CDPAP, CHHA and Private Duty Nursing. Includes SSI & seniors wo/Medicare, children, families, singles & couples < 65 on "MAGI" Medicaid (ACA Medicaid)
2. **DUAL ELIGIBLES –** Most are required to enroll in **Managed Long Term Care** (MLTC) plans to get home care/LTC. But since can take many months -->
   - → "**Immediate Need" PCS or CDPAP services** –Dual eligibles may apply to local Dept. of Social Services (**LDSS**) even if normally would be required to enroll in MLTC plan. Receive services through LDSS for 120 days and then must transition to MLTC. See http://www.wnylc.com/health/entry/203/.
3. **Some people are excluded (**barred**)** or "**exempt**" (their choice) from enrolling in MLTC or mainstream plans.. They **access PCS & CDPAP from local DSS/CASA** & private duty nursing from State DOH. For ex:
   - OPWDD, NTDW & TBI waiver participants *excluded* from MLTC and *exempt* from mainstream plans.
   - People receiving hospice at time of enrollment *excluded* from MLTC & mainstream plans, though if already in a plan they can stay in plan and receive hospice.

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Coming in 2021 or 2022

ELIGIBILITY CHANGES FOR PERSONAL CARE & CDPAP

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RAISING THE BAR OF WHO is ELIGIBLE for PCS/CDPAP – CURRENT LAW

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- **CURRENT LAW:** if consumer needs **any** assistance with "Activities of Daily Living" → eligible for PCS or CDPAP, which includes ADLs and IADL assistance, whether through MLTC, Local DSS/Immediate Need, or mainstream Medicaid managed care.
- If don't need ADL assistance, may still get stand-alone "**Housekeeping" service** up to 8 hrs/week from LDSS/HRA ("Level 1" personal care*) for "Instrumental ADLs" (IADLs)

18 NYCRR § 505.14(a)

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Coming later in 2021 or 2022 --

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Minimum ADL requirement

2020 NYS Budget law: Eligibility for PCS/CDPAP & MLTC will be limited to those who need:

- *Limited assistance* with **physical maneuvering** with **3 ADLs or**
- If have a **dementia or Alzheimer's** diagnosis - need "at least **supervision** with **2 ADLs**
- Need for help with IADLs is not considered.

WHEN? Sometime in 2021 or 2022. Stay tuned.

Current recipients grandfathered in – Those *receiving* services at effective date grandfathered in (details unclear)

§ 2-a, 2-b, 3, 21, amending S.S.L. §§ 365-a subd.2 (e), 365-f, subd. 2

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3- or 2- ADL requirement

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Stand-alone Housekeeping Service ENDING

- Now, if consumer only needs IADL but NOT ADL assistance, they could apply to DSS/HRA or request their mainstream MCO for "Housekeeping" Level 1 services - maximum 8 hours/weeki.
- EX: Susan has diagnosis causing dwarfism. She can do self-care – bathe, dress – but not laundry, shopping, etc. without help.
- **THIS PROGRAM IS ENDING.**
  - **Current "Housekeeping" recipients grandfathered in** (600 NYC cases in 12/2020)
  - But **no NEW applications will be accepted** for Housekeeping
- Not a smart policy to eliminate this PREVENTATIVE service. Will lead to falls, other accidents -- and then will need ADL help.
- Only option – non-Medicaid **EISEP** services through County office of the aging/ NYC DFTA.** But must be 60 years old! No services available for younger people with disabilities.

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*18 NYCRR 505.14(a)(5)(i)
** https://aging.ny.gov/expanded-home-services-elderly-eisep

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3 ADL Requirement

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ADL counts only if need "Limited Assistance with "Physical Maneuvering"

Unless dementia or Alzheimer's diagnosis, ADL counts toward the minimum only if needs "at least limited assistance with physical maneuvering." The **UAS instructions** define the degrees of assistance as follows:

1. Independent
2. Independent, setup help only – Article or device placed within reach, no physical assistance or supervision in any episode.
3. **Supervision – Oversight/cuing. Will Not Count unless has Dementia diagnosis**
4. **Limited assistance – Guided maneuvering of limbs, physical guidance without taking weight. This is minimum amount of need to count. Does this include "Contact guarding" (hovering)?**
5. Extensive assistance – Weight-bearing support (including lifting limbs) by one helper where person still performs 50% or more of subtasks.
6. Maximal assistance – Weight-bearing support (including lifting limbs) by two or more helpers; or, weight-bearing support for more than 50% of subtasks.
7. Total dependence – Full performance by others during all episodes.

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Who is left out? Those who need "supervision" but not physical maneuvering with ADLs because of diagnoses other than dementia

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- Only **Dementia** or **Alzheimer's** diagnosis qualifies to count an ADL based on needing "supervision" not hands-on assistance
- Leaves out:
  - Traumatic Brain Injury
  - Developmental Disability
  - Visual impairments
  - Other cognitive, neurological or psychiatric impairment
- This discriminates based on diagnosis and is illegal in our view. Should include anyone who needs supervision because of *any* impairment.

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Returning to Community from Nursing Home – Preventing Placement

ISSUES FOR ACCESSING SERVICES TO RETURN OR REMAIN HOME

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Strategy tip if not already enrolled in Plan

- IMMEDIATE NEED APPLICATION

- If not already in MLTC plan before admitted to a nursing home (short term or long term), can file fast-track application for Immediate Need PCS or CDPAP –with DSS.* Much faster than enrolling in MLTC.
  - If don't already have Medicaid, include Medicaid application with Supplement A DOH-5178A
- Advantage for married consumers – may request "**spousal impoverishment**" protections in this program. See http://www.wnylc.com/health/entry/165/.
- DSS authorizes & provides services for 120 days, then NY Medicaid Choice sends notice that consumer must select an MLTC plan or will be auto-assigned to one.
- When enroll in MLTC plan after receives the NY Medicaid Choice notice, consumer has **transition rights** -- the MLTC plan must give same hours that DSS gave for 90 days, then can only reduce hours if proves good cause. See MLTC Policy 16.06.

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*See requirements at http://www.wnylc.com/health/entry/203/.

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For Managed care & LDSS Immediate need

24-Hour Care available – Live-in or 2-12 hour shifts

NYS Medicaid includes 24-hour PCS or CDPAP for those who, because of medical condition, need daily assistance with toileting, walking, transferring, turning or positioning. Regs give clear standards for consumer to prove needs one of 2 types of 24/7 care:

1. **Split Shift** – "uninterrupted care, by **more than one personal care aide**, for more than 16 hours in a calendar day for a patient who …needs assistance with such frequency that a live-in 24-hour PCA would be unlikely to obtain, on a regular basis, **5 hours daily of uninterrupted sleep** during the aide's eight hour period of sleep."
2. **Live-in** – "care by **one personal care aide** for a patient …whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, **five hours daily of uninterrupted sleep during the aide's eight hour period of sleep."**
   - Home must have adequate sleeping accommodations for aide.

GIS 15 MA/024 (12/2015), 18 NYCRR 505.14(a), (b)(3)(ii)(b), MLTC Policy 15.09
https://www.health.ny.gov/health_care/medicaid/redesign/mltc_policy_15-09.htm

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New Obstacles to 24/7 care – PCS & CDPAP

- Obtaining 24/7 PCS or CDPAP has always been difficult. Need strong evidence of medical necessity, night-time logs of paid or unpaid caregivers, evidence consumer is prone to pressure sores, etc.
  - NYS DOH MLTC Policy 16.07* is good statement of factors plan should consider – span of time & frequency of needs, etc.
- 2020 NYS Budget changes – when implemented in 2021-22, NEW assessments will be required that will delay approvals, including a high-need review if Plan or DSS determine consumer needs more than 12 hours/day. See next slide.

*https://www.health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policy/16-07.htm

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Obstacles to 24/7 care
New Assessment System – DSS & Plans

- **If DSS or Plan find,** based on initial nurse assessment and a *new* "Independent Practitioner Panel" assessment, **that consumer needs > 12 hours/day →Must refer for High–Need "Independent Review Panel" (IRP) *by NY Medicaid Choice*** – recommends whether proposed plan of care is appropriate to maintain health & safety in the home.
  - **Saying "unsafe" can be pretext for denying 24/7 care → force into nursing home – violate *Olmstead* and ADA.**
  - ADA regs say a "public entity must ensure that its safety requirements are based on **actual risks**, not on **mere speculation, stereotypes, or generaliza-tions** about individuals with disabilities."*
  - IRP not required on reassessment if IRP previously reviewed plan of care of > 12 hours/day
- Plan/DSS make final decision, but weight of IRP not yet known.
- New assessments will cause delays

* ADA regulation 28 CFR §35.130(h)

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Obstacles to obtaining Needed Care - DELAYS

- Plan DELAYS approving increases are harmful – delay discharge from facility or cause admission to facility
- **FINANCIAL DISINCENTIVE to PROVIDE ADEQUATE CARE** - Plans receive the same premium from the State ("capitation") for every member, so they save money by giving fewer hours, and lose money with high hours.
- Long process for plan to process requests for increase (next slide), followed by long appeal process. "Exhaustion" of plan appeal now required before consumer may request a Fair Hearing. See http://www.wnylc.com/health/entry/184/. Plan has incentive to delay increase through appeals.

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Delays –MLTC/ mainstream plan have short deadlines to decide requests for Increase or New Services

Type of Request	Maximum time for Plan to Decide
Expedited*	**3 business days from receipt of request,** though plan may extend up to 14 calendar days if needs more info.
Standard	**14 calendar days from receipt of request,** though plan may extend up to 14 calendar days if needs more info.
Medicaid covered home health care services following an inpatient admission**	(1) business day after receipt of necessary info; except when request made the day before a weekend or holiday, **no more than three (3) business days** after receipt of the request for services.

42 C.F.R. 438.210(d). *Expedited if delay would seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function. 42 CFR 438.210
**NY Insurance Law § 4903(c)(1).

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What if Plan Doesn't Make Decision by Deadline?

- If the plan does not issue a decision on a request for services within the deadlines stated above –
- this constitutes a **denial** and is thus an **adverse action**, which can be appealed just as a written decision can be appealed. 42 CF.R. 438.404(c)(5). (Request internal Plan Appeal, then if denied, Fair Hearing)
- This is why it is important to make request for increase/new service in writing - And keep proof that you made it. Otherwise you cannot appeal if plan fails to decide on your request.

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Obstacles to Obtaining 24/7 care

Delays from New Assessments starting 2021-22

The battery of new assessments required by 2020 NYS Budget to be implemented in 2021-22 will cause inevitable delays in:

1. MLTC enrollment & authorization of services – initial and increases
2. Immediate Need applications at HRA/DSS
3. Hospital & Rehab discharges where home care needed

On top of the existing nursing assessment (Uniform Assessment Tool), there will be 1-2 more assessments done by NY Medicaid Choice:

1. Independent Practitioner Panel (IPP) - doctor, nurse practitioner, or physician's assistant
2. Independent Review Panel (IRP) – where need > 12 hours/day only

How can plans comply with time limits on previous slide, or LDSS approve Medicaid AND home care within 12 Days of application in IMMEDIATE NEED cases?

In response to consumer complaints about delays, DOH says DSS/Plan *may* (not *must*) authorize interim care pending the IRP High Need Review. Since not REQUIRED, no RIGHT to this increase.

*Proposed 505.14(b)(3)(i), 505.28(e)(i)(7)
https://health.ny.gov/health_care/medicaid/redesign/mrt2/express_terms_summary.htm

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TIP if Received PCS/CDPAP services before nursing home stay: *Granato v. Bane*

- Plan or DSS refusal to reinstate same home care hours that were authorized before hospital/rehab stay is an unlawful discontinuance or reduction without notice & Aid continuing rights. *Granato v Bane*, 74 F.3d 406 (2d Cir. 1996).
- Cite guidance* to MLTC plan counsel or appeal liaisons, to request Plan Appeal – then Fair Hearing -- for illegal discontinuance/ reduction without notice, then Fair Hearing. Reinstatement of hours required as Aid Continuing.
- If previous hours are no longer enough, you must also request increase from plan, but ask family to cover additional hours– paid or informal – so client can safely return home with the reinstated hours as Aid Continuing, pending appeal of denial of increase. By getting client home, this refutes plan's claim that client "must" be in NH and is not safe at home.

*NYS DSS 99 OCC-LCM-2 (Apr. 20, 1999), reaffirming effectiveness of 96-MA-023 - New Notice, Aid-Continuing and Related Procedures Applicable to Hospitalized MA Recipients Who Received Personal Care Immediately Prior to Hospitalization (*Granato v. Bane*), http://www.wnylc.net/pb/docs/99OCCLCM2.pdf , http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/96ma023.pdf

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Homebound client may qualify for temporary increase in hours 45 days after Fair Hearing request

- If consumer is unable to travel to the hearing site without great difficulty, then he/she may be a Varshavsky class member. If after the initial hearing, ALJ cannot make a **fully favorable** decision, no decision is issued, and a 2nd part of the hearing will be conducted in the home.
- 45 days after hearing requested, if 2nd part of hearing at client's home is not held and decided, OTDA orders plan or LDSS to give **interim Varshavsky increase** to amount sought in hearing. Can make return home possible!
- You need a doctor's note to substantiate the client's "homebound status" to get *Varshavsky* rights. Though in COVID all hearings are held by phone, only those who document homebound status get *Varshavsky* relief.

Varshavsky v. Perales, 608 N.Y.S.2d 194 (App. Div. 1994), see article and fact sheet at http://www.wnylc.com/health/entry/228/ .

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Another obstacle to avoiding NH placement

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MLTC members disenrolled from plan if in Nursing Home 3+ months (“LTNHS”)

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- Phpehuv#nfflyh#qrwfh#urp#Q\#Phdlfdlg#Fkrlfh#zlwk#43#gd|v#wr# +4,#lntxhvw#dlu#khdubj#ru#5,#fdo#Q\#Phdlfdlg#Fkrlfh#40;;0734098;5# dqg#lntxhvw#dvvhvvp hqw#wr#eh#glvfkdujhg#krph#
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MLTC members disenrolled “LTNHS” *con’d*.

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- Rqo|#shuvrq#lwkhg#dv#Dxwkrul}hg#Uhs#rq#wkh#Phdlfdlg#dss#nfflyh#d# frs|#r#wkh#qrwfh1#Wr#eh#dwhg/#xsep lwEnup #GRK0857:#0Phdlfdlg# Dxwkrul}hg#Uhsuhvhqwdwlyh#Shvljqdwrq2#Fkdqjh#Uhtxhvw-- wr#Drfd#Ghsw# Vrfldo#Vhuylfhv#GVV,1##Lq#Q\F=
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FdoolFDQ#;7709470;;33 dqg#Ghsw#ri#Khdowk#POWF# Frp scdllqwvÙ40;990:450:4<:#i=

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**https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/17ma017_english.pdf

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Housing Expenses – Special Income Standard

- Only After Discharge from Nursing Home or Adult Home
- 2022 Expansion!

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MLTC Housing Allowance

- Income disregard for people discharged to the community **with MLTC** after at least **30 days** in:
  - A **nursing home** or **adult home -** GIS 14/MA-017
  - 2022 – should be expanded to people who leave nursing or adult home with **Immediate Need services,** if they initiated process to enroll in MLTC. L. 2021 Ch. 57 Part NN
- Medicaid (not just Medicare) must have paid for part of stay
- Must have a housing expense – rent or mortgage
- If married, can't use spousal impoverishment protections and MLTC Housing Allowance – must pick which budgeting is better

SSL §366 subd. 14, NYS DOH 12 OHIP/ADM-5, http://www.wnylc.com/health/entry/212/

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MLTC Housing Allowance (2021) GIS 20 MA/13 - - 2021 Medicaid Levels (Attachment I)

Region	Counties	Deduction
Central	Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga, Tompkins	$450
Long Island	Nassau, Suffolk	$1393
NYC	Bronx, Kings, Manhattan, Queens, Richmond	$1535
Northeastern	Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren, Washington	$524
Northern Metropolitan	Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester	$1075
Rochester	Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, Yates	$469
Western	Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming	$413

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Housing Allowance

Applying the housing allowance lowers Morgan's spend-down. They live in Dutchess County - Northern Metropolitan region.

	Morgan
Income	$2,127.50
Part B premium	- $148.50
Income disregard	- $20.00
Housing allowance (Dutchess)	-$1075.00
Medicaid standard (single)	-884.00
Excess Income (spend-down)	**$0**
Wo/housing allowance	**$1075.00**

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Obtaining the shelter allowance

- As with spousal impoverishment, it is not automatic.
- MLTC plans are responsible for notifying LDSS of member's potential eligibility (they typically do not), but consumer can submit request to LDSS directly.
- Must submit the following (NYC forms):
  - MAP-3057 – Attestation of Housing Expense
    - Don't need proof of housing expense, but wouldn't hurt
  - MAP-259D – Discharge Notice [filed by Nursing Home]
  - Cover letter requesting rebudgeting, along with guidance

Forms and more info in article at
http://www.wnylc.com/health/entry/212/

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