NSCLC
National Senior Citizens Law Center
PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS

POLICY ISSUE BRIEF

MARCH 2011

Medicaid Payment for Assisted Living

Providing a Home-Like Environment

The Problem

Ms. Clark lives in an assisted living facility. Her care is funded by Medicaid through a Home and Community-Based Services (HCBS) waiver. HCBS funding is meant to provide alternatives to nursing home care for persons with significant care needs. As the name suggests, Home and Community-Based Services should be provided in a non-institutional environment.

For Ms. Clark, however, her assisted living care has many institutional characteristics. Her living unit has one bedroom and one bathroom, each of which Ms. Clark shares with another resident. Facility staff members routinely go in and out of the living unit without knocking or otherwise asking permission. Ms. Clark has little privacy, and the care that she receives does not feel to her to be "community-based."

Discussion

In the operation of HCBS waivers, the federal Centers for Medicare and Medicaid Services (CMS) allows payment for assisted living services even when the resident's living unit is not private. CMS has requested public comment on this issue, and currently is considering modifying this policy. For services in an assisted living facility truly to be "community-based," each resident should have the right to a private living unit, and staff should enter the living unit only with the resident's permission.

Assisted Living Services Currently Qualify as "Community-Based" Services

Federal law authorizes Medicaid monies to be spent for "home or community-based services (other than room and board)" provided as an alternative to nursing facility care."[1] Currently, assisted living facilities almost automatically are considered "community-based settings," and thus are eligible for Medicaid HCBS waiver funding. For example, a federal HCBS regulation requires states to assure that

1 42 U.S.C. § 1396n(c)(1).

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certain residential care facilities meet minimal preexisting quality of care standards.[2] Similarly, another regulation authorizes certain waiver services for persons with chronic illness "whether or not [those services are] furnished in a facility."[3]

The standard waiver application template, in Appendix C-2, asks states to "describe how a home and community character is maintained" in facilities with four or more residents. It is unknown how the Centers for Medicare & Medicaid Services (CMS) currently might require states to change facility standards to enhance facilities' "home and community character." The Colorado waiver application included the state's acknowledgement that the "fundamental nature" of many of the state's assisted living facilities was not community-based, along with the state's promise to develop a plan to rectify the situation.[4] Subsequently, in March 2009, the state released revised regulations that (as the state described) "incorporate aspects of home and community requirements."[5]

Services Sometimes Are Ineligible Under Newly Authorized Medicaid Options

HCBS State-Plan Option

As part of the Deficit Reduction Act of 2005, Congress added a new Medicaid mechanism to pay for home and community-based services. From a state's point of view, the primary difference is that the new program is adopted as a state-plan option—no waiver is needed. Also, enrollment is limited to those persons whose incomes do not exceed 150 percent of the federal poverty line.[6]

The state-plan option shares many program features with the waiver program.[7] A difference is that the federal government in the state-plan option seems inclined to take a much harder look at whether a residential care facility (such as an assisted living facility) actually provides an environment that can be considered "home" or "community-based." CMS has proposed regulations that would require it to develop "standards for community living facilities," and would require additional scrutiny if a beneficiary were "living in a residence with four or more persons unrelated to the proprietor, which furnishes one or more treatments or services."[8]

In distinguishing between "institutional" and "home or community-based," core factors include (according to CMS) resident independence, community integration, and residence size. A setting is more likely to be considered "home or community-based" if the resident can do the following:

2 42 C.F.R. §§ 441.302(a)(3), 441.310(a)(1).
3 42 C.F.R. § 440.180(b)(8).
4 Colorado HCBS – Elderly, Blind and Disabled Waiver, Appendix C-2-c-2.
5 Colorado Dep't of Health Care Pol'y & Financing, Dear Administrator Letter #03-09-1NF (March 17, 2009).
6 42 U.S.C. § 1396n(i)(1).
7 42 U.S.C. § 1396n(i)(1).
8 73 Fed. Reg. 18,676, 18,697 (2008) (proposed 42 C.F.R. § 441.556(3)).

- Control access to, and furnish, private living quarters.
- Have visits and telephone calls with privacy.
- Have access to food and a kitchen at unscheduled times.

On the other hand, a setting is more likely to be considered "institutional" if a resident does not have a private living space and/or is forced to follow facility-determined routines.[9]

Money Follows the Person Program

The Money Follows the Person program (MFP) also was enacted as part of the Deficit Reduction Act of 2005. Under MFP, the federal government has made grants to 31 selected states for five-year demonstration projects. The goal of these projects is to enable nursing facility residents to move out of their facilities into home or community-based settings.[10]

The MFP program is limited to persons who have lived in an "inpatient facility" for six months to two years, and who move into a "qualified residence." On one hand, an assisted living facility is not an "inpatient facility," which is defined as a hospital, nursing facility, intermediate care facility for the mentally retarded, or (sometimes) an institution for mental diseases. On the other hand, however, an assisted living facility may not be a "qualified residence" either. The MFP law specifies that a "qualified residence" can be the person's home (owned or leased), a community-based residence with no more than four unrelated residents, or—and this is the pivotal language for many assisted living facilities—"an apartment with an individual lease, with lockable access and egress, and which includes living, sleeping, bathing, and cooking areas over which the individual or the individual's family has domain and control."[11] To this point, CMS has interpreted the law in a way that prevents many assisted living facilities from being treated as qualified residences.[12]

Recommendations

Assisted Living Facilities Should Provide Home-Like Character

Medicaid programs are authorized to fund Home and Community-Based Services (HCBS) as an alternative to nursing home services. HCBS funding should not be used for services provided in an institutional environment. For HCBS funding to be available for services provided in an assisted living facility, the facility should meet each of the following criteria.

9 73 Fed. Reg. 18,676, 18,685-86 (2008).
10 Pub.L. 109-171, Title VI, § 6071(a)(2), 120 Stat. 102 (2006).
11 Pub.L. 109-171, Title VI, § 6071(b)(6) 120 Stat. 102 (2006).
12 CMS, Housing Questions and Answers Regarding Money Follows the Person, Q & A #8 (emphasis in original).

1. The unit/room should be a specific physical place that can be owned or rented by the person receiving services, and the person should have, at a minimum, the same protections from eviction that the state's tenants have under landlord/tenant law.
2. Each resident should have privacy in the unit.
   a. Units should have lockable entrance doors, with appropriate staff having keys to doors.
   b. Residents should share units only at the residents' choice.
   c. Unless residents sharing a unit are spouses or partners, each resident should have an individual bedroom.
   d. Residents should have the freedom to furnish and decorate their living units.
3. Residents should have the freedom and support to control their own schedules and activities, and should have access to food at any time.
4. Residents should be able to have visitors of their choosing at any time.

These criteria have been adopted by the Assisted Living Consumer Alliance, www.assistedlivingconsumers.org. To read other policy issue briefs and white papers in this series, go to www.medicaidalseries.org.

The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation and the education and counseling of local advocates, we seek to ensure the health and economic security of older adults with limited income and resources, and access to the courts for all.

The Assisted Living Policy Issue Brief Series

With support from the Commonwealth Fund, the National Senior Citizens Law Center (NSCLC) recently undertook an extensive study of federal and state Medicaid policies for assisted living coverage, focusing on how those policies impact the lives of assisted living residents.[1] The results of this study are laid out in a series of policy issue briefs being released by NSCLC from Fall 2010 through Spring 2011. Each of these policy issue briefs discusses problems with the status quo, and makes recommendations for change.

This policy issue brief recommends that the federal government establish meaningful standards to assure that, when Medicaid Home and Community-Based Services funding is used for assisted living services, the assisted living facility offers single-occupancy accommodations and privacy. This policy issue brief and an accompanying white paper are available at NSCLC's website, www.nsclc.org.

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1 The research included a survey of respondents in the 37 states that pay for assisted living services through a Medicaid Home and Community-Based Services waiver, as well as more in-depth research of policies and practices in five of those states: Arkansas, New Jersey, Oregon, Texas, and Washington. The research was conducted in cooperation with the University of California at San Francisco. This paper, however, is written by the National Senior Citizens Law Center, which is solely responsible for the findings, opinions, and recommendations expressed herein.