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

POLICY ISSUE BRIEF

MARCH 2011

Medicaid Payment for Assisted Living

Protecting At-Home Spouse from Impoverishment in Medically-Needy Eligibility

The Problem

Mr. Chen has $2,300 in monthly income; his wife has no monthly income. Between the two of them, they have $20,000 in available savings.

Their state's Medicaid program provides coverage for nursing home care or, alternatively, assisted living facility services provided through a Medicaid Home and Community-Based Services (HCBS) waiver. Under either type of care, Medicaid eligibility is available to a person whose monthly income does not exceed $2,022 or (through medically-needy eligibility) to a person whose health care expenses consume most of the person's monthly income.

Federal law provides for protections against spousal impoverishment that, in Mr. Chen's state, are set at the federal minimums. Specifically, a nursing home resident can make an allocation to the at-home spouse of $1,821 in monthly income and $21,912 in savings.

Mr. Chen is eligible for Medicaid if he is admitted to a nursing home. He can allocate his wife $1,821 in income, leaving himself with the $50 personal needs allowance authorized by Medicaid, and an obligation to pay the remaining $429 to the nursing home ($1,821 + $50 + $429 = $2,300). He also can allocate his wife $18,000 in savings, and retain the $2,000 allowed by Medicaid.

If Mr. Chen moves into an assisted living facility, however, he will not be able to allocate income or savings to his wife. Because Mr. Chen's income exceeds $2,022 monthly, he would not be automatically eligible, and would be seeking eligibility under the medically-needy category. Unfortunately for him, the federal government will not allow a state to offer spousal impoverishment protections when a person is seeking coverage for HCBS services under medically-needy eligibility. Mr. Chen will not be eligible until he spends savings down to a total of $2,000. And even when eligibility is eventually obtained, he will be required to spend virtually all of his income on assisted living services, room, and board, with no ability to allocate income to his wife.

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Discussion

The federal Centers for Medicare and Medicaid Services (CMS) has interpreted Medicaid law to not allow spousal impoverishment protections for HCBS waiver applicants (including assisted living facility residents) who seek eligibility through the medically needy category. CMS's interpretation is not supported by federal law, and unfairly tends to force married persons into nursing homes in order to receive necessary long-term services and supports. Under the 2010 health care reform law, this problem will be rectified for five years beginning in 2014, when spousal impoverishment protections will be mandatory for all HCBS waiver beneficiaries, but there is no need to wait until then. CMS should correct its current interpretation as soon as possible to make spousal impoverishment protections available to medically-needy applicants.

CMS has ruled that spousal impoverishment protections are not available to medically-needy waiver beneficiaries. Washington is an example of one state that has encountered this problem. Although Washington's COPES special-income-limit waiver provides for spousal impoverishment protections, the state's Medically Needy Residential waiver does not. This difference is attributable not to the Washington Medicaid program but to the federal government—the state requested spousal impoverishment protections but the request was denied.[1]

CMS claims that its hands are tied by federal law. The spousal impoverishment law applies to an "institutionalized spouse," which is defined as a person who is in a hospital or nursing home, or who receives HCBS waiver services *through a particular eligibility subsection in Medicaid law*.[2] That subsection is within a section of Medicaid law that applies to persons eligible categorically, i.e., automatically, without having to document a particular level of health care expenses.[3] CMS points to this statutory structure to argue that the spousal impoverishment protections cannot apply to persons applying through the medically needy program.

CMS's statutory interpretation is subject to serious challenge. As described immediately above, CMS claims that a particular statutory subsection includes only categorically-eligible waiver beneficiaries. But it is that exact same subsection that is referenced in Medicaid law's description of persons subject to transfer of asset penalties, and in that case CMS has chosen to interpret that reference as including all HCBS beneficiaries—not just those that are categorically-eligible., and including those who qualify as medically-needy.[4]

In other words, the HCBS population referenced in the spousal impoverishment law's definition of an "institutionalized spouse" is the same HCBS population referenced in the transfer-of-asset law's definition of an "institutionalized individual" to whom transfer penalties can apply. CMS should not be able to have things both ways: since the transfer-of-assets provisions are interpreted to

1 *See generally* Wash. Dep't of Soc. & Health Servs., Report to the Legislature: Application for Medicaid Medically-Needy Waiver (Nov. 15, 2002).
2 42 U.S.C. § 1396r-5(h)(1)(A).
3 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI).
4 42 U.S.C. § 1396p(h)(3).

apply broadly to all HCBS beneficiaries, then the spousal impoverishment protections also should apply broadly and include all eligibility categories for HCBS services.

Also, CMS's interpretation does not appear in concert with legislative intent. There is nothing in the legislative record to suggest that medically-needy waiver beneficiaries be excluded across-the-board from spousal impoverishment protections, and the health reform law's modification of the spousal impoverishment statute appears aimed at the narrow reading being imposed by the agency.

Recommendations

Spousal Impoverishment Protections Should Be Allowed

A strong legal argument can be made that CMS has taken an incorrect position on this issue. If medically-needy waiver beneficiaries are subject to transfer of asset penalties, applicants for medically-needy eligibility should be eligible for spousal impoverishment protections: the same description of waiver beneficiaries is used in both the transfer-of-assets law and the spousal impoverishment law. At a minimum, the relevant statutory language is ambiguous, and by law that ambiguity allows CMS to take the position that states can offer spousal impoverishment protections to medically-needy waiver beneficiaries.

There is no justifiable policy reason for spousal impoverishment protections to be available to medically-needy nursing home residents but not to medically-needy waiver beneficiaries. CMS should take steps as soon as possible to reverse its earlier position and make spousal impoverishment protections available to residents from both eligibility groups. CMS should not wait until, pursuant to the 2010 health care reform law, the protections become mandatory in waiver settings for the five years beginning in 2014.

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 and state governments do not impose never-end periods of ineligibility for transfers of assets, and instead administer transfer-of-assets penalties so that a period of ineligibility can run while the applicant resides in an assisted living facility or receives long-term services and supports while living at home. This policy issue brief is 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.