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Medicaid Payment for Assisted Living Transfer of Assets: Making Assisted Living Residents Ineligible Forever

The Problem: An Example

Mr. Frank, a widower, has lived in an assisted living facility for six months. His savings are almost exhausted, so he recently applied for Medicaid coverage for his assisted living services. His state's Medicaid program covers assisted living services through a Medicaid Home and Community-Based Services waiver.

Unfortunately, the Medicaid program rejected Mr. Frank's Medicaid application, ruling that he is ineligible forever for coverage of assisted living services. The problem is that two years ago, Mr. Frank gave \$10,000 to his daughter. The Medicaid program claims that he made that gift to hasten his eligibility for Medicaid coverage. Worse, the Medicaid program has said that the gift will make Mr. Frank ineligible forever for coverage of assisted living services, even though he would be ineligible for only two months if he were to move to a nursing home.

Discussion

Some state Medicaid programs are improperly imposing a never-ending period of ineligibility as a transfer-of-assets penalty for people seeking Medicaid waiver coverage for assisted living services. A federal judge in New Jersey ruled that such penalties violate federal Medicaid law. Federal and state governments should change their policies so that never-ending periods of ineligibility are not imposed.

In 37 states, the Medicaid program pays for assisted living services through a Home and Community-Based Services (HCBS) waiver. As authorized by federal law, an HCBS waiver is meant to provide alternatives to nursing home care for persons whose care needs are high enough to justify admission to a nursing home.

For coverage in a nursing home or under an HCBS waiver, a Medicaid program is required to impose



a penalty to deter persons from giving away assets to hasten Medicaid eligibility. The transferring person is ineligible for Medicaid-funded nursing home care or HCBS waiver coverage for the number of months for which the given-away assets could have paid for that care.

The Deficit Reduction Act of 2005 (DRA) brought a change in methodology which some states implemented in ways that discriminate against assisted living residents and other persons seeking coverage under an HCBS waiver. The issue is when a period of ineligibility begins.

Before the DRA, penalty periods began running when the transfer was made. For example, if a nursing home resident transferred away \$20,000 in January, and nursing home care cost \$5,000 per month, the resident would be automatically ineligible for Medicaid coverage of nursing home care for 4 months ($20,000 \div 5,000 = 4$). The four-month period of ineligibility would begin in January and end after April.

After the DRA, however, transfer penalties begin in the month in which applicants meet all eligibility requirements and would be receiving coverage but for the ineligibility caused by the transfer. Assume, using the facts in the preceding paragraph, that the resident was not otherwise eligible for Medicaid coverage until April. The four-month period of ineligibility would not start until April and then would run through July, so that the resident would not be eligible for Medicaid coverage of nursing home care until August.

The improper implementation is due to some CMS employees and states asserting that applicants for HCBS services cannot have their penalties begin until they first enter institutions. Under federal law, a penalty starts when a person receives nursing home care or “[h]ome or community-based services furnished under [a Medicaid HCBS] waiver.” Interpreting this language, some states have claimed that privately reimbursed care at home or in an assisted living facility does not qualify as “[h]ome or community-based services furnished under” a waiver. (Emphasis added.)

Under this claim, a never-ending period of ineligibility is caused by the transfer of any amount. Because the period of ineligibility never starts, it never is able to run its course. The applicant is ineligible forever for Medicaid-funded HCBS waiver services, unless he enters a nursing home to start the period of ineligibility.

Recently, a federal district court in New Jersey ruled that the New Jersey Medicaid program violated federal law in imposing the never-ending penalty. See *Frugard v. Velez*, 2010 WL 1462944, 2010 U.S. Dist. LEXIS 34996 (D. N.J. Apr. 8, 2010). This court ruling, however, explicitly addressed only the individual plaintiffs, and state Medicaid programs are still imposing never-ending penalties on person seeking waiver coverage. See, e.g., Arkansas Dep’t of Health & Human Servs., Division of County Operations, Policy Directive, Medical Services Policy Manual, MS 06-09.



Recommendations

The federal Centers for Medicaid and Medicare Services should instruct states that a never-ending period of ineligibility is inappropriate, and that periods of ineligibility should be able run their course while an applicant resides in an assisted living facility or receives long-term services and supports while living at home. Similarly, state Medicaid programs should not impose never-ending periods of ineligibility, and should administer transfer-of-assets penalties so that the months of ineligibility can run their course while the applicant resides in an assisted living facility or receives long-term services and supports while living at home.

Imposition of a never-ending penalty is irrational, as it forces persons to move into nursing homes in order to obtain Medicaid coverage. This type of irrational incentive violates the Americans with Disabilities Act, by unnecessarily forcing persons to move to nursing homes. It also is wholly contrary to the public policy consensus that prefers home care and assisted living services as alternatives to nursing home care.

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 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.nslc.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.

