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Medicaid Payment for Assisted Living

Preventing Discrimination Against Medicaid-Eligible Residents

Introduction

The National Senior Citizens Law Center (NSCLC) recently undertook an extensive study of federal and state Medicaid policies towards assisted living, with a focus on how those policies impact the lives of assisted living residents.¹ The study and the development of this policy issue brief were supported by The Commonwealth Fund.

Policy recommendations resulting from this study are laid out in a series of policy issue briefs that will be 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 is the first in the policy issue brief series. This policy issue brief discusses how Medicaid-eligible persons often are subject to discrimination, and includes recommendations for policy changes. A companion white paper discusses the same issues with more detail from the study findings.

In Practice, Medicaid-Eligible Assisted Living Residents Often Are Discriminated Against.

It is a bedrock Medicaid principle that beneficiaries receive covered services at Medicaid rates. Medicaid-certified providers, as a condition of certification, agree to accept Medicaid as full payment for Medicaid-covered services. This requirement is routinely applied to physicians, medical equipment suppliers, nursing homes and other Medicaid suppliers — but not necessarily to assisted living facilities.

Medicaid-eligible residents constitute more than 10 percent of the population of assisted living facilities and this percentage certainly will grow. Yet assisted living can be a glaring exception to Medicaid's payment-in-full requirement, as federal and state authorities often do not enforce this requirement in assisted living settings. As a result, frail elders who were sold the promise of "aging in place" find themselves facing eviction when they become eligible for Medicaid. Or they are told

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1 The research included a survey of respondents in the 37 states that pay for assisted living service 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.



that because a facility has adopted a new “business model,” they have to leave their home in a month’s time. An example is an 89 year old woman, evicted because her assisted living facility no longer accepted Medicaid. After given the eviction notice, she grew depressed and refused to go to meals, asking “Why can’t I just die here.” Within a week of the forced move, her health worsened, and she died within the month.²

Nursing home residents used to be subjected to similar practices but, after seeing the impact on residents and families, Congress stepped in. The Nursing Home Reform Law, enacted in 1987, requires that a Medicaid-certified nursing home accept Medicaid as payment in full. It is time that assisted living residents share in this basic protection.

Problems Are Widespread

NSCLC’s review of state practices and regulations found that in the majority of states, Medicaid-certified assisted living facilities feel free to refuse Medicaid payment or withdraw from Medicaid certification midstream. These practices bring anxiety, trauma and dislocation to vulnerable elders and to their families.

Assisted living residents routinely face facility practices inconsistent with Medicaid principles. These practices include:

Ms. Elkins Had to Pay Private Rate for a Year

Ms. Elkins found a facility offering a “Winter Wonderland” special. Under the offer, she received one free month of rent in return for her agreement to pay the private-pay rate for at least one year before utilizing Medicaid coverage. The family kept her part of the agreement but the facility later decided not to accept new Medicaid-eligible residents. The administrator said that Ms. Elkins would have to leave when her savings fell to Medicaid eligibility levels. Ultimately she was able to stay, but only because her son obtained assistance from the New Jersey Public Advocate’s Office, which conducted a large-scale investigation against the assisted living chain. Other residents, unrepresented, were forced to leave.³

Mr. Rush Had to Move After Facility Reduced its Number of Medicaid Residents

Mr. Rush lived in an assisted living facility for eight years, and the facility received over \$400,000 from Mr. Rush and his family. When Mr. Rush and his family ran out of money, they expected that he would be able to stay under Medicaid payment, as the facility was Medicaid-certified. The facility, however, told Mr. Rush that he had to leave, because the facility had decided to reduce its percentage of Medicaid-eligible residents. As a result, Mr. Rush left the facility involuntarily, forced to move to another facility across town.⁴

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2 Vanesso Ho, Even Elderly Are Facing Eviction, Seattlepi.com (Feb. 6, 2009).

3 N.J. Dep’t of Public Advocate, Aging in Place: Promises to Keep, at 27 (2009).

4 Assisted Living Residents Face Eviction, Northwest Cable News, www.nwcn.com/news/health/61540332.html (Aug. 15, 2009).



Ms. Doe Asked to Leave When Facility Decertified

Ms. Doe had been living in an assisted living facility in Seattle for almost 11 years. She paid the private-pay rate for the first several years, but then relied on Medicaid after exhausting all her savings. In June 2010, the owner sent a notice requiring Ms. Doe and six other Medicaid-funded residents to vacate, because the facility would no longer accept Medicaid. Her daughter, who helps Ms. Doe handle her paperwork, intercepted the notice. Her daughter feared that the stress of a move from her home of more than a decade would likely kill her mother, who has a heart condition and a history of breathing and swallowing constriction when she becomes anxious. The staff, so far successfully, has hidden from Ms. Doe the fact that she may need to move, but the stress on staff and daughter has been substantial. In the three months since the notice, Ms. Doe's daughter spent hundreds of hours battling with state agencies and the facility owner, and enlisting the help of the state long-term care ombudsman and a private pro bono attorney. So far, Ms. Doe's mother is still in the facility but already four other residents have been forced to move.⁵

Strong Policy Responses Are Needed

A review of federal and state policies found that beneficiaries are often vulnerable to eviction. Although a federal regulation requires that Medicaid-certified providers accept Medicaid-approved rates as payment in full,⁶ the federal Centers for Medicare and Medicaid Services in practice has failed to insist that this requirement be applied to Medicaid-certified assisted living facilities.

States have responded in different ways to consumer concerns. Most states do not address the issues, allowing facilities to discriminate in various ways against Medicaid-eligible residents. Some states require that facilities disclose their policies to consumers, but allow the underlying practices. A minority of states explicitly require a facility to accept the Medicaid-approved amount as payment in full. This information is discussed in more detail in a companion white paper, available at www.nslc.org.

Because of the unevenness and lack of clarity, changes are needed at both the federal and state level.

At the Federal Level:

A federal response would give Medicaid recipients uniform protections wherever they live. Comprehensive action should include:

- *Revise Regulations to Apply to Assisted Living:* Medicaid regulations should be revised to explicitly apply the Medicaid-as-payment-in-full requirement (42 C.F.R. § 447.15) to certified assisted living facilities.
- *Make Waiver Approval Dependent on Inclusion of Protections:* CMS should require that a state include the protections discussed here as a condition of approving a waiver for Medicaid payment for assisted living services.

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⁵ Personal interview by National Senior Citizens Law Center, August 2010. "Ms. Doe" is a pseudonym.

⁶ 42 C.F.R. § 447.15.



- *Amend Federal Statutes to Protect Assisted Living Residents:* Federal Medicaid law was amended in 1999 to protect *nursing home* residents when a facility decertifies itself from Medicaid.⁷ Under this amendment, a nursing home that has decertified from Medicaid must accept Medicaid coverage for any resident who was living in the nursing home at the time of decertification, even if the resident did not become Medicaid-eligible until after the decertification. A comparable provision should be enacted to protect assisted living residents.
- *Correct Misinterpretation of Assisted Living Resident Rights:* Congress should correct current misinterpretation of the rights of assisted living residents. Federal nursing home law explicitly states that a Medicaid-certified facility must accept Medicaid coverage from Medicaid-eligible residents.⁸ A comparable provision should be enacted for residents of certified assisted living facilities.

At the State Level:

Through state statutes, regulations, waiver applications, and provider manuals, states should establish the following standards:

- *Require Facilities to Accept Residents Regardless of Medicaid Status:* The best beneficiary protection is a requirement that, as a condition of Medicaid certification, a facility accept residents on a first-come, first-serve basis. In the absence of such an admission requirement, facilities should be prohibited from evicting, requesting supplemental payment from, or otherwise discriminating against any current resident on account of that resident being or becoming Medicaid-eligible.
- *Prohibit Facilities from Penalizing Current Residents:* States should prohibit facilities that drop out of the Medicaid program from penalizing current residents. Any resident in the facility on the date of decertification should be able to use Medicaid reimbursement for a stay in the facility, if and when the resident qualifies for Medicaid coverage.
- *Disclosure:* Assisted living contracts should be required to clearly state the facilities' policies on acceptance of Medicaid. Facilities should be held to their contracts.

Next Steps

NSCLC looks forward to working with federal and state governments and with advocates to address the challenges facing Medicaid-eligible assisted residents. For more information on the practices discussed here or information about the situation in a particular state, contact NSCLC attorneys Eric Carlson, ecarlson@nsclc.org, or Gene Coffey, gcoffey@nsclc.org.

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7 42 U.S.C. § 1396r(c)(2)(F); Pub. L. 106-4 (1999).

8 42 U.S.C. §1396r(c)(5)(A)(i).



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.

