



National Senior Citizens Law Center

PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS

WHITE PAPER

MEDICAID PAYMENT FOR ASSISTED LIVING

Refusing to Admit Eligible Applicants

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The Issue

For a variety of reasons, Medicaid beneficiaries can face difficulties in obtaining Medicaid-covered care in a Medicaid-certified assisted living facility. Some facilities deny admission to applicants who present relatively greater care needs. Others reject Medicaid-eligible applicants in order to save space for more lucrative private-pay residents.

In general, current federal Medicaid law does not set standards for assisted living facilities. It is left to each state to determine what should be required of assisted living facilities receiving Medicaid reimbursement. This white paper examines barriers that limit admission to assisted living facilities, along with ways in which some states have addressed those barriers.

Denials Based on Applicant's Care Needs and/or Medicaid Eligibility

Background

Facilities not uncommonly refuse admission to applicants who have relatively more intensive care needs and/or are Medicaid-eligible. In practice, the applicant generally has no easy remedy. For a denial related to care needs, the applicant could bring a lawsuit under the Americans with Disabilities Act, alleging improper discrimination, but such lawsuits are time-consuming and rare.¹

Discrimination based on care needs occurs in both assisted living facilities and nursing facilities. It affects Medicaid beneficiaries most strongly, since facilities generally prefer applicants who can pay the private pay rate.

In all cases, the underlying problem is that a facility generally is not obligated to admit any one applicant. Because facilities have an incentive to favor applicants with fewer care needs and more money, Medicaid beneficiaries with higher care needs can find themselves effectively shut out of necessary services.

State Laws Limiting Discretion of Assisted Living Facilities

In a study of the states that offer assisted living services through a Medicaid waiver program, the National Senior Citizens Law Center (NSCLC) identified a limited number of states that have addressed this problem. One of these states is *Texas*, which requires assisted living facilities to justify decisions to deny admission to Medicaid-eligible applicants. A Medicaid-certified facility must accept a referral from the Texas Department of Human Services, unless

1. The referral would put the facility over its licensed or certified capacity, or

¹ See, e.g., Eric M. Carlson, *Long-Term Care Advocacy* (Matthew Bender & Co.), at § 3.04[2] (use of federal anti-discrimination laws to combat admission denials based on care needs).



2. The facility cannot meet the referred person's needs and has followed specified procedures with an interdisciplinary team that includes the resident or resident's representative.²

Provider respondents to the NSCLC study complained that these requirements discouraged a facility's participation in the Medicaid waiver program, and pressured a facility to admit applicants for whom it could not provide adequate care. On the other hand, residents and their representatives considered the process as a valuable counterweight to a facility's discretion otherwise to make admission decisions without any review.

Washington also has developed policies to limit discrimination based on care needs. Washington licensing law for assisted living incorporates Americans with Disabilities Act concepts, although in the context of discharge rather than admission. When a resident's care needs exceed a facility's disclosed scope of services, the facility is authorized to exceed that scope by making a "reasonable accommodation." Providing such an accommodation, according to Washington law, may or may not mean that the facility is capable of providing, or required to provide, the same higher scope of care to other residents.³

The Washington law does not attempt to specify what a reasonable accommodation might be. If a facility chooses to provide assistance with activities of daily living, such assistance must be provided "consistent with the reasonable accommodation requirements in state or federal laws."⁴ Similarly, regarding health support services or intermittent nursing services, Washington law states that "the facility may or may not need to provide [such services] to comply with the reasonable accommodation requirements in federal or state law."⁵

New Jersey also has addressed these issues, requiring Medicaid-certified assisted living facilities to reserve at least 10 percent of their occupied beds for use by Medicaid-reimbursed residents. This minimum can be met either by admission of persons who already are Medicaid-eligible, or by retention of private-pay residents after they spend down their savings to Medicaid levels.⁶ The state can waive or reduce the ten percent requirement, either statewide or only for certain areas, if the state determines that assisted living facilities already are providing an adequate number of beds for Medicaid-reimbursed residents.⁷

The New Jersey law applies only to those facilities licensed in or after September 2001. Because most facilities were licensed prior to 2001, the New Jersey law applies to a relatively small

2 The interdisciplinary team includes the resident and/or resident's representative, a facility representative, and a DHS representative (who may be the case manager, contract manager, or regional nurse). 40 Tex. Admin. Code §§ 46.11(d), 46.35(a).

3 Wash. Rev. Code Ann. § 18.20.300(4).

4 Wash. Rev. Code § 18.20.310(2).

5 Wash. Rev. Code Ann. §§ 18.20.320(1), 18.20.330(1).

6 N.J. Stat. Ann. § 26:2H-12.16; N.J. Admin. Code tit. 8, §§ 8:33H-1.7, 8:36-5.1(h).

7 N.J. Stat. Ann. § 26:2H-12.17; N.J. Admin. Code tit. 8, § 8:36-5.1(l).



percentage of the state's assisted living facilities.

Another limiting factor is that the law is not easily enforced by individual consumers. Its provisions apply to overall percentages and thus are not relevant unless the facility's current percentages are already on the thin line between acceptable and unacceptable. Furthermore, even assuming that a facility's percentages in fact are on that line, an individual consumer has little ability to know that information or to force a facility to admit her.

Pending New Jersey legislation would extend these requirements to all assisted living facilities, not just those licensed in 2001 and subsequently. Also, the legislation would require facilities to accept Medicaid reimbursement on behalf of any current resident, and reserve five percent of capacity for persons who are Medicaid-eligible at the time of admission.⁸

Illinois also requires facilities to maintain a certain percentage of Medicaid-eligible residents, but the Illinois requirements apply regardless of the date of the facility's licensure or certification. Facilities generally must reserve at least 25 percent of their units for Medicaid-reimbursed residents. This requirement is waived if a facility's private-pay rate is equivalent to the Medicaid rate, but in that case the facility must accept Medicaid residents on a first-come, first-served basis.⁹

Recommendations

Medicaid beneficiaries have very limited financial resources, and are dependent upon Medicaid eligibility and the availability of Medicaid-certified providers. Thus, Medicaid certification for assisted living care should carry with it an appropriate obligation to provide reasonable access to Medicaid beneficiaries. It would be inappropriate for a certified facility to have complete discretion to refuse admission to Medicaid beneficiaries.

The current requirements employed by Texas and Illinois should be adopted by other states' Medicaid programs. As is currently the case in Texas, a Medicaid-certified assisted living facility should be required to accept a referral of a Medicaid-eligible applicant by the relevant state department. Also, as is the case in Illinois, a Medicaid-certified assisted living facility should be required to maintain its Medicaid-eligible census at a level of at least 25 percent of the facility's capacity. This percentage requirement would be raised or lowered to reflect the numbers of certified facilities and the numbers of residents eligible for Medicaid payment of assisted living care.

⁸ N.J. A. 2004; N.J. S. 1113 (2010-11).

⁹ Ill. Admin. Code § 146.215(d).



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. In many instances, a policy issue brief has a companion white paper that discusses the same or related issues in greater detail.

This paper is one of the companion white papers, providing more detail on admissions barriers for Medicaid-eligible beneficiaries. This paper is designed to be used as a resource by advocates, state Medicaid officials, facility operators, and others with an interest in developing or improving Medicaid policies related to assisted living. Both this white paper and the accompanying policy issue brief 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.

