



National Senior Citizens Law Center

PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS

WHITE PAPER

MEDICAID PAYMENT FOR ASSISTED LIVING

Residents Have a Right to Return After Hospitalization

JANUARY 2011

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The Issue

In most states, Medicaid-eligible residents of assisted living facilities who are absent, even for just a few days, can face eviction from the assisted living facility. There are several reasons for this problem. Most state Medicaid programs do not make room hold payments for hospitalized residents, or residents who are absent for another reason. Moreover, many states do not require that an assisted living facility give admission priority to a resident returning to the facility after hospitalization or another type of absence. The lack of protections leads to instability for assisted living residents and significantly impairs the value of assisted living as a community-based alternative to nursing facility care.

This white paper recommends that assisted living facilities be required to hold rooms during hospitalizations and other absences, that Medicaid programs pay for room holds, and that absent Medicaid-eligible residents in any case have the right to be readmitted to an assisted living facility's next available room.

Background on Medicaid HCBS Waivers

Medicaid payment for assisted living care generally is made in one of two ways. The state Medicaid plan may provide for personal care services, or the state may have a Medicaid home and community-based services (HCBS) waiver that authorizes payment for services provided in an assisted living facility. In either case, Medicaid reimbursement to an assisted living facility is always payment for services—never for room and board charges.

This white paper analyzes only the second option—Medicaid HCBS waiver payment for assisted living care—as this is by far the most common way in which Medicaid programs pay for assisted living care. Currently 37 states pay for assisted living services through Medicaid waivers, whereas only 16 states pay through a state plan program. (Some states use both methods.)

The Medicaid HCBS waiver (also sometimes called a Section 1915(c) waiver)¹ is designed to prevent or delay nursing facility admissions. Under the waiver, Medicaid reimbursement can be provided only for a Medicaid beneficiary whose care needs would qualify her for nursing facility admission, and only for those services that enable her to remain in her home or in an assisted living facility.² Such services include, but are not limited to, home health aide services and personal care services.³ Room and board expenses cannot be reimbursed.⁴

By and large, federal Medicaid law does not set quality of care standards for waiver services. Instead, states are directed to ensure that quality of care is protected, and the waiver application

1 The relevant federal statute, 42 U.S.C. § 1396n(c), is Section 1915(c) of the Social Security Act.

2 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(VI), 1396n(c)(1); 42 C.F.R. § 435.217

3 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180(b)(3), (4).

4 42 U.S.C. § 1396n(c)(1); 42 C.F.R. § 441.310(a)(2); see also *Leocata v. Leavitt*, 148 Fed. Appx. 64 (2d Cir. 2005) (rejecting Americans with Disabilities Act challenge to Medicaid's ability to pay for room and board in nursing facility, but not in assisted living facility).



requires a state to certify that certain quality issues will be addressed.⁵

Comparison: Room Holds in Nursing Facilities

A federal regulation allows—but does not require—a Medicaid program to pay to hold a room during a resident’s “temporary absence from an *inpatient facility*.”⁶ In practice, according to an official of the Centers for Medicare & Medicaid Services (CMS), such an “inpatient facility” generally is a nursing facility or an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Almost always, a room hold occurs while a resident is hospitalized, although the relevant regulation also allows a Medicaid room hold payment for other types of absences included in the resident’s care plan. A state Medicaid program may pay a room-hold rate lower than its typical rate, if the facility’s costs are less for a held room than for an occupied room.⁷

Regardless, as noted, a state Medicaid program is not *required* to make payment for a room hold. In accord, the federal Nursing Home Reform Law does not require that a facility offer a room hold to any resident. Instead, for temporarily hospitalized Medicaid-eligible residents, the Reform Law requires a nursing facility to offer readmission to the next available bed. Also, the facility must notify all residents of its room hold policies.⁸

Thus, in any state, a Medicaid-eligible nursing facility resident will be eligible for readmission to the facility’s next available bed, following a hospitalization of any length. On the other hand, the availability of a room hold depends upon state law. Some states both provide for room hold payment by the Medicaid program, and impose a corresponding obligation on the nursing facility to make a room hold available up to the number of days authorized by the Medicaid program.⁹

CMS Authorizes States to Use Personal Assistance Retainer Payments to Protect Assisted Living Residents

Because an assisted living facility is not a nursing facility or any other type of “inpatient facility,” the previously-discussed federal regulation does not apply to assisted living facilities. Nevertheless, CMS guidance provides a similar route by which states can pay for room holds.

On July 25, 2000, the federal Health Care Financing Administration (HCFA, the predecessor

5 42 U.S.C. § 1396n(i)(1)(H).

6 42 C.F.R. § 447.40(a) (emphasis added).

7 42 C.F.R. § 447.40.

8 42 C.F.R. § 483.12(b).

9 *See, e.g.,* Cal. Code Regs., tit. 22, §§ 51535.1(b) (Medicaid payment), 72520 (facility’s obligation).



to CMS), issued *Olmstead* Update No. 3.¹⁰ “Olmstead” refers to the case of *Olmstead v. L.C.*,¹¹ in which the U.S. Supreme Court ruled that state governments have obligations under the Americans with Disabilities Act to develop policies that do not unnecessarily institutionalize persons with disabilities.

Olmstead Update No. 3 listed seven policy changes designed to promote alternatives to institutionalization. In one of these changes, HCFA announced that “personal assistance retainer payments” would be available to pay HCBS waiver service providers during a beneficiary’s temporary absence, such as a hospitalization. Without these payments, HCFA explained, service providers for at-home care would not have income during an absence, and often would be forced to seek other work rather than waiting for the temporarily institutionalized beneficiary.

HCFA described the retainer payments as comparable to room hold payments made to nursing facilities and other institutions. The duration of the retainer payments cannot “exceed the lesser of 30 consecutive days or the number of days for which the State authorizes a payment for ‘bedhold’ in nursing facilities.”¹²

Impact on State Policies

A. Most States Do Not Pay for Room Holds in Assisted Living.

Our survey of states found that many states do not appear to understand the federal guidance or, at least, are not implementing it. For example, a provider respondent from *Oregon* identified the unavailability of room holds as a significant negative in the state’s waiver program. When a resident is hospitalized in Oregon, the facility is unable to obtain Medicaid reimbursement to cover the days in which the resident is absent from the facility.

In *Ohio*, a room hold requires that the resident pay only the room and board rate. A state-issued consumer guide explains that residents must pay their room and board obligations even when absent from the facility, and that the Medicaid program does not pay for days in which the resident has been absent.¹³

Also in *New Jersey*, the Medicaid program does not pay for room holds, although there is some evidence that facilities may offer holds regardless. Medicaid-certified New Jersey facilities have been required by the state to disclose their room hold policies for a “medical leave.” Based on the disclosure statements submitted to the state and then obtained by the study through a public

10 HCFA, Olmstead Update No. 3 (July 25, 2000), available at www.cms.hhs.gov/smdl/downloads/smd072500b.pdf.

11 527 U.S. 581 (1999).

12 HCFA, Olmstead Update No. 3, Attachment 3-c (July 25, 2000).

13 Ohio Dep’t of Aging, Understanding the Assisted Living Waiver Program: A Consumer’s Guide, at 19-20 (Aug. 2008).



records act request, the overwhelming majority of facilities—84 percent—indicated that they would hold a room. Notably, facilities offered rather lengthy room holds, predicated on the facility receiving at least some payment for the days in question. Of the facilities offering room holds, 46 percent offered room holds from 15 days to one month, and another eighteen percent similarly specified that a room could be held through the end of a paid-for month. Another 12 percent of the facilities said that a room could be held for more than a month.

These room hold policies were based on a facility’s expectation of payment for the room hold days. Only six percent of facilities indicated that no payment would be required for room hold days. Fifty-eight percent of the facilities required payment of the room and board charge. Another 28 percent required payment of the resident’s regular amount, comprised of the room and board charge and the resident’s share under Medicaid rules for the cost for services. An additional eight percent of the facilities required payment of not just the regular Medicaid amount (room, board, and services), but the private-pay rate for the room.

B. Some States Pay for Room Holds, But Their Policies Vary.

The study identified several states that pay for room holds for Medicaid-eligible assisted living residents. The details vary.

Respondents from both Montana and Georgia described their payments as being authorized by the HCFA guidance in Olmstead Update No. 3. *Montana’s* assisted living room hold payments are dependent upon approval by the resident’s Case Management Team. The reason for the absence appears to be irrelevant: the state’s manual says that “[t]he consumer may be in a hospital, nursing facility, or visiting friends or relatives for this period of time.” Payment is limited to 30 days annually and cannot be made if the facility’s negotiated rate includes vacancy savings.¹⁴

Georgia’s HCBS waiver for assisted living services states that “[p]lanned visits away from the facility are a reimbursable service when such visits are therapeutic in nature, approved by the attending physician, and/or if the [resident] requires hospitalization.”¹⁵ Therapeutic visits are limited to 16 days annually; reimbursement for hospitalizations cannot exceed more than seven days per hospital stay.

The study identified two state Medicaid programs—Washington and Illinois—that paid for assisted living room holds with state-only money. A state respondent from Washington explained that payment for room holds nonetheless was cost-effective, by ensuring that residents are able to return to a comparatively economical assisted living setting.

Under *Washington’s* rules, the Medicaid program pays to hold an assisted living room for up to twenty days, if a resident temporarily moves to a nursing facility or hospital. Payment can

14 Mont. Dep’t of Public Health & Human Servs., Home and Community Based Waiver Manual § 410.

15 Georgia Elderly & Disabled Waiver, Appendix C-1/C-3 (Alternative Living Services).



only be made if the program’s social worker or case manager determines that the resident will be gone on a short-term basis and will likely be able to return to the facility.¹⁶ For each of the first seven days, the Medicaid program pays 70 percent of the Medicaid daily rate. For the next 13 days (days 8 through 20), however, the program pays only \$11 per day.¹⁷ A provider respondent identified this limited room hold payment as a negative, since the facility does not receive full reimbursement.

The facility may accept “third-party payment”—presumably, in most cases, from a family member—for the 21st day and thereafter. This third-party payment cannot exceed the Medicaid daily rate. In any case, the facility is obligated starting on the 21st day to readmit the resident to “the first available and appropriate bed or unit,” even if third-party payment had not been made.¹⁸

Illinois makes payments, using state-only funds, for up to 30 days annually for a resident’s absence “due to situations such as hospitalizations or vacations,” but not when the resident has been admitted to a nursing facility.¹⁹ The absent resident remains responsible for room and board charges.

Colorado regulations authorize Medicaid payment for up to forty-two days annually while the resident either is on a non-medical leave (e.g., family visits) or a programmatic leave (prescribed by a physician for therapeutic and/or rehabilitative purposes). During this time, the facility is paid the normal rate by the Medicaid program; any room and board obligation remains with the resident. A state respondent was unclear as to whether the state’s room hold payments were made with federal financial participation.

Under the Colorado rules, rehabilitation may include a stay in a nursing facility, as long as it remains likely that the resident will be returning to the assisted living facility. During this time, the Medicaid program is allowed to pay both the assisted living facility and the nursing facility for the same resident, although generally the nursing facility stay is Medicare-covered under the Part A benefit that covers twenty days with no co-payment. A state respondent said that such rehabilitative stays tend to be limited to a month at most; after that point, the Medicaid program considers very carefully whether the resident really is likely to return to the assisted living facility.²⁰

A rehabilitative stay does not necessarily start on the resident’s first day of absence. The state respondent offered a common example of a resident who breaks a hip, is hospitalized for several days, and then is admitted to a nursing facility for two weeks of rehabilitation. In this situation, the programmatic leave covers the days in the nursing facility but not the days in the hospital.

16 Wash. Rev. Code § 18.20.290(1), (2); Wash. Admin. Code §§ 388-105-0045(1), (2), (5), 388-110-100(6).

17 Wash. Rev. Code § 18.20.290(2); Wash. Admin. Code § 388-105-0045(3).

18 Wash. Rev. Code § 18.20.290(3); Wash. Admin. Code §§ 388-105-0045(4), 388-110-100(7).

19 Ill. Admin. Code tit. 89, § 146.225(f).

20 10 Colo. Code Regs. 2505–10, §§ 8.495.1 (definitions), 8.495.6.C, 8.495.7.D (leaves in assisted living).



Recommendations

The right to hold a room, or at least return to a room in the same facility, can be vitally important to an assisted living resident. There is no reason that a short absence (for a hospitalization, visit with family, or otherwise) should force an assisted living resident to move permanently from the facility.

To this point, there seems to be some confusion amongst federal and state officials about the availability of room hold payments under federal waiver law. CMS should resolve this confusion by clearly articulating that room hold payments are permissible; if necessary, the relevant regulation can be revised accordingly. Also, state Medicaid officials should use existing authority to provide for room hold payments and, at a minimum, guarantee a resident's right following a hospitalization to return to the first available room in an assisted living facility.

To rectify the situation across the country, federal Medicaid law should be revised to ensure room holds, room hold payments, and first-available-room readmission for residents of Medicaid-certified assisted living facilities. The protections should apply to all temporary absences, not just hospitalizations. If an assisted living facility truly is to be offering services that are "home or community-based," its residents must have enough stability so that they can leave their residence for a few days (or weeks) without subjecting themselves to eviction.

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 how assisted living residents may hold rooms during hospitalizations. 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 payment for assisted living. Both this paper and the accompanying policy issue brief are available at NSCLC's website, www.nsclc.org.

The study and the development of this paper were supported by The Commonwealth Fund, a national, private foundation based in New York City that supports independent research on health care issues and makes grants to improve health care practice and policy. The views presented here are those of the author and not necessarily those of The Commonwealth Fund, its directors, officers, or staff.

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.

