

Legal Basics: Medicaid Long-Term Services and Supports, at Home or in Congregate Settings

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with sound? Use the chat box.
- Slides and a recording will be available at [NCLER.acl.gov](https://www.ncler.acl.gov). See also the chat box for this web address.

NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration on Community Living's Administration on Aging.

Justice in Aging

Justice in Aging is a national non-profit legal advocacy organization that fights senior poverty through law. Formerly the National Senior Citizens Law Center, since 1972 we've worked for access to affordable health care and economic security for older adults with limited resources, focusing especially on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency. Through targeted advocacy, litigation, and the trainings and resources we provide to local advocates, we ensure access to the social safety net programs that poor seniors depend on, including Medicare, Medicaid, Social Security, and Supplemental Security Income (SSI).

Coverage of Nursing Facility Services

Nursing Facility Services

- Nursing facility services are mandatory.
- No enrollment limits.
- Based on need for nursing facility services, with no time limits.

Financial Eligibility for Nursing Facility Services (and, often, HCBS)

- Income less than federal poverty level (\$1,005 monthly)
 - Or federal poverty level with certain amount of income excluded.
- Often nursing facility services and HCBS limited to incomes $\leq 300\%$ of federal SSI ($\$735 \times 3 = \$2,205$)
 - Miller trusts might be used for “excess” income.

Financial Eligibility (cont.)

- Or state may offer coverage under medically needy programs.
 - Under “income cap” eligibility or medically needy eligibility, residents will have to pay most of income for health care.

Financial Eligibility Examples

- Assume monthly income of \$2,000, and income allocation of \$50 for nursing facility, and \$1,500 for HCBS.
 - Nursing facility: Beneficiary pays \$1,950 monthly.
 - HCBS: Beneficiary pays \$500 monthly.

Spousal Impoverishment Protection

- Applies always to nursing facility benefit and is mandatory for HCBS through 2018 (at state option thereafter).
- Allows community spouse to maintain higher amount in resources.
 - Up to \$120,900 in 2017.
- Allows community spouse to maintain income up to state-specific limit.
 - \$2,033 to \$3,022.50 in 2017

Spousal Impoverishment Resource Protections

- State sets Community Spouse Resource Allowance from \$24,180 to \$120,900
 - "Community spouse" can keep $\frac{1}{2}$ of joint resources up to \$120,900
 - Or, can keep minimum as set by state from \$24,180 to \$120,900

Spousal Impoverishment Income Protections

- Community spouse can obtain some of resident's income as necessary to raise total income to amount set by state between \$2,030 to \$3,022.50
- Community spouse can keep all of his or her own income, no matter how much

For example

- Couple has \$200,000.
 - Spend down to \$100,000.
 - Can keep \$120,900 + \$2,000 if state has set allowance at max.
- Couple has \$100,000.
 - Can keep entirety if state has set allowance at max.
 - At minimum keeps \$50,000 + \$2,000.

Example (cont.)

- Couple has \$40,000
 - The right to keep half is irrelevant.
 - Can keep entirety, or at least \$24,180 + \$2,000, or something in between, depending on where state has set allowance.

Home and Community-Based Services Provided Through Waiver

HCBS Waiver

- Provide HCBS as alternative to institutional care.
 - Hospital, nursing facility, or intermediate care facility.
- Person must qualify for the corresponding institutional coverage.
- Overall cost neutrality – federal and state gov'ts pay no more than they otherwise would have paid.
 - State has option of requiring beneficiary-specific cost neutrality.

HCBS Services

- E.g., Personal care services.
- Case management.
- Home health aides.
- Adult day health care.
- Assisted living.
- Home modifications.

Participant-Directed Services

- Programs increasingly enable beneficiaries to direct services.
 - Employer authority -- training, hiring, & firing.
 - Budget authority – allocating money within the Medicaid-allocated amount.
 - Financial management services provide logistical safeguard.
 - Could be private entity or gov't agency.

Limited Enrollment, Potentially

- Waiver can allow state to
 - Limit enrollment.
 - Limit eligibility to particular populations.
 - Limit coverage to particular regions of state.
- State remains subject to ADA requirements.
 - State programs should not lead to unnecessary institutionalization.

Potential Eligibility Issues

- Counseling of client prior to clinical evaluation, so client is prepared to describe his or her needs.
- Transparency of clinical decision-making algorithm and process.
- Notice of appeal rights.
- ADA/Olmstead issues.

HCBS State Plan Amendments

HCBS Through State Plan Rather than Waiver

- 2005 Deficit Reduction Act authorizes HCBS through state plan, rather than waiver process.
- Enrollment not subject to numerical or geographic limitations.
 - But eligibility can be limited to particular populations.

Financial Eligibility for HCBS State Plan Coverage

- Income less than 150% of federal poverty level, or
- Eligibility for HCBS through other HCBS mechanism.
 - This will likely bring in eligibility for income of no more than 300% of federal SSI benefit level.

Clinical Eligibility for HCBS State Plan Coverage

- State must use needs-based standards.
 - Reference to ADL tests, but state has discretion to set standards.
- Nursing facility eligibility must also use needs-based standards.
 - Standards for nursing facility coverage must be **more stringent** than standards for HCBS.

Community First Choice Program

Financial Incentive for State Participation

- Eligibility without enrollment caps.
- 6% increase in federal financial participation rate.

Financial Eligibility

- Income not exceeding 150% of federal poverty level, or
- Meeting financial eligibility standards for nursing facility coverage – often, 300% of federal SSI benefit.

Services

- Typical HCBS, e.g., personal care services, home health aides, adult day care, assisted living, etc.
- **Must** include
 - Services that assist person in acquiring or maintaining ability to perform ADLs.
 - Back-up system to ensure continuity of services.
 - Training on tasks of participant direction.

Specified Optional Services

- Payment of transition costs.
 - E.g., Rent and utility deposits.
 - First month's rent.
 - Kitchen supplies.
 - Bedding.

Nursing Home Reform Law

Compliance with Federal Standards

- Applies if nursing facility certified for Medicaid and/or Medicaid.
- Protects all residents, regardless of payment source.
- No discrimination based on form of reimbursement.

Care Planning

- Assessment through Minimum Data Set (MDS).
- Care planning directed by resident to the extent possible.
- Care planning involving team including facility staff, resident physician, and other persons chosen by the resident.
- Facility must reasonably accommodate resident preferences.

Broad Provision of Services

- Services so resident can attain or maintain highest practicable physical, mental and psychosocial well-being.
- Therapy should be provided whenever ordered by physician.

Visitors

- Right to accept visitors at any time of the day or night.
 - Facility potentially can assess “reasonable clinical and safety restrictions” for visitors who are not family members.

Involuntary Transfer/Discharge

- Only allowed for one of six reasons:
 - No longer needs nursing facility care.
 - Needs more than nursing facility care.
 - Endangers others' health.
 - Endangers others' safety.
 - Non-payment.
 - Facility closing.

Frequent Improper Discharges When Medicare Coverage Ends

- Resident should be able to continue under Medicaid, if he or she chooses.
 - Does state allow partial Medicaid certification?
- Notice should be sent to resident and ombudsman program.
 - Notice required whenever transfer/discharge is resident-initiated.

Standards for HCBS Settings

Settings Requirements

- HCBS must truly be non-institutional.
- Regulations released January 2014.
 - Approved transition plans by March 2019.
 - Full compliance by states and providers by March 2022.

Standards Applicable to All Settings

- Integration with community.
- Privacy and dignity.
- Choice, including
 - Services and supports.
 - Service providers.
 - Daily activities.
 - With whom to interact.

Standards Specific to Provider-Owned or –Controlled Settings

- Specific physical space, not just a right to be housed within a certain building.
 - Including protections against eviction at least equivalent to protections provided by state’s landlord-tenant law.

Privacy and Choice

- Locked doors to living unit.
- Choice to
 - Furnish and decorate unit.
 - Choose roommate.
 - Decide schedule.

Visitors and Food

- Right to accept visitor at any time.
- Access to food at any time.

Modification of Requirements for Provider Owned/Controlled Settings

- Modification through person-centered service plan.
 - Recipient must consent.
- Service plan must
 - Identify need.
 - Document previous interventions.
 - Describe modification that is proportionate to need.
 - Provide for periodic review

Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

Additional Resources

- Eric Carlson, Justice in Aging,
ecarlson@justiceinaging.org
- Jennifer Goldberg, Justice in Aging,
jgoldberg@justiceinaging.org
- Medicaid Statute: 42 U.S.C. §§ 1396- 1396w-5
- Medicaid Regulations: 42 C.F.R. §§ 430.1- 435.1015
- Centers for Medicare & Medicaid Services Website,
www.medicaid.gov
- Justice in Aging Resources,
www.justiceinaging.org/keep-older-adults-home-community

Questions